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IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

CONFERENCE OF STATE BANK SUPERVISORS, PEOPLE OF THE STATE OF ILLINOIS, ex rel. WILLIAM C. HARRIS, Commissioner of Banks and Trust Companies,

Petitioners,

vs.

C. T. CONOVER, Comptroller of the Currency of the United States,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

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QUESTION PRESENTED

Did the Court of Appeals err when it adopted the interpretation of the International Banking Act of 1978 advanced by the Comptroller of the Currency when that interpretation circumscribed the states' rights and effectively invalidated state legislation regulating foreign bank activities, notwithstanding the express language of that Act, which provides that the Comptroller (a) may authorize a foreign bank to establish a home state federal branch or agency only in a state where such establishment "is not prohibited by state law," and (b) may allow a foreign bank to establish and operate an interstate federal branch or agency only in a state where such establishment and operation "is expressly permitted by the state in which it is to be operated?"

PARTIES INVOLVED

Petitioner William C. Harris, is the Commissioner of Banks and Trust Companies in Illinois. Commissioner Harris is charged with the duty of applying and carrying out the provisions of Illinois' Financial Institutions Code. Ill. Rev. Stat., 1981, Ch. 17, ¶456.

Petitioner Conference of State Bank Supervisors is an association composed of the state government officials responsible for regulating state-chartered banking institutions in the fifty states and their counterparts in Guam, Puerto Rico, and the Virgin Islands. In 1958, the Conference invited state-chartered commercial banks and mutual savings banks to become "associate members," and there are currently about 5,000 such associate members. Associate members, however, may not vote at meetings of the Conference and therefore do not vote on Conference decisions or policies.

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In The

Supreme Court of the United States

October Term, 1983

CONFERENCE OF STATE BANK SUPERVISORS, PEOPLE OF THE STATE OF ILLINOIS, ex rel. WILLIAM C. HARRIS, Commissioner of Banks and Trust Companies,

Petitioners,

vs.

C. T. CONOVER, Comptroller of the Currency of the United States,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

Petitioners respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the District of Columbia Circuit entered in this proceeding on August 9, 1983, which permitted the Comptroller of the Currency to charter federal branches and agencies of foreign banks in states where those banks would not be eligible for a state charter.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the District of Columbia Circuit was entered on August 9, 1983, is reported at 715 F.2d 604 (D.C. Cir. 1983), and is appended to this petition as Appendix A. The judgment of the District Court was entered on September 30, 1981, is not reported, and is appended to this petition as Appendix B.

JURISDICTION

The opinion and judgment of the Court of Appeals were entered on August 9, 1983. An extension of time to file this petition was allowed until December 7, 1983. This Court's jurisdiction to review a judgment of the Court of Appeals by a writ of certiorari is therefore invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES INVOLVED

The pertinent provisions of the International Banking Act of 1978 are set forth in Appendix D.

STATEMENT OF THE CASE

By this petition, the State of Illinois and the Conference of State Bank Supervisors seek to uphold the right of states to regulate the establishment and operation of foreign banks within their borders. Illinois law, for example, limits foreign banks to opening a single branch, which must be located in the "central business district of Chicago." Ill. Rev. Stat., 1981, Ch. 17, ¶2706. Furthermore, Illinois law will not allow a foreign bank to open a branch here unless reciprocity is extended by the foreign bank's home country. Ill. Rev. Stat., 1981, Ch. 17, ¶2710. The Comptroller refuses to recognize the validity of these and similar state laws under his interpretation of sections 4(a) and 5(a) of the International Banking Act of 1978. The validity of the Comptroller's regulations and his authority to disregard such state law enactments are the subject of the instant petition.

ARGUMENT

THE DECISION OF THE COURT OF APPEALS WHICH UPHELD THE COMPTROLLER OF THE CURRENCY'S INTERPRETATION OF THE INTERNATIONAL BANKING ACT OF 1978 AS PREEMPTING ALL STATE LAWS REGULATING THE ESTABLISHMENT AND OPERATION OF FEDERAL BRANCHES AND AGENCIES OF FOREIGN BANKS BY THE STATES SHOULD BE REVIEWED BY THIS COURT SINCE IT PRESENTS SIGNIFICANT ISSUES AS TO THE AUTHORITY OF THE STATES TO MAINTAIN CONTROL OVER THE OPERATIONS OF FOREIGN BANKS WITHIN THEIR JURISDICTIONS AND BECAUSE THIS DECISION HAS A SIGNIFICANT IMPACT ON THE DUAL BANKING SYSTEM.

This Petition presents substantial questions of first impression which are of national import regarding the ability of the several states to determine the scope of permissible foreign bank activities within their respective borders under the International Banking Act of 1978 (IBA), Pub. L. No. 95-369, 92 Stat. 607 (codified in scattered sections of 12 U.S.C.) Prior to the enactment of the IBA, the states were free to decide whether to permit foreign bank entry and also to determine the extent to which foreign banks would be authorized to transact business, since foreign bank activities were regulated almost exclusively by the states.

In adopting the IBA, Congress continued to defer to state policy determinations on the questions of foreign bank entry and operations under sections 4(a) and 5(a) of the Act. Section 4(a) provides that a foreign bank may open a home state federal branch or agency only where the establishment of such an office "is not prohibited by state law." 12 U.S.C. § 3102(a). Section 5(a) provides that an interstate federal branch or agency may be established

or operated by a foreign bank only where its operation "is expressly permitted in the State in which it is to be operated." 12 U.S.C. § 3103(a). Thus, under these sections of the IBA, state prohibitions on foreign bank entry and state limitations on foreign bank operations determine the extent of the federal charter option which is available to foreign banks.

Notwithstanding the clear language of these provisions, the Comptroller of the Currency (Comptroller) refuses to give effect to state laws imposing restrictions on foreign bank activities, contending that this language of the IBA only authorizes states to permit or prohibit entry by foreign banks generally, it does not authorize the states to place limitations upon such entry. Thus, the Comptroller claims that if a state permits entry by *any* foreign bank, he may allow entry by *all* foreign banks under federal charter, notwithstanding specific state prohibitions such as reciprocity requirements. Accordingly, the Comptroller has allowed Australian banks to establish federal branches in Illinois and New York despite state statutes prohibiting entry by such banks because Australia does not permit reciprocal entry by U.S. banks.

The Comptroller's interpretation, which was adopted by the Court of Appeals for the District of Columbia Circuit, must be overturned for two reasons. First, it improperly preempts state authority to make policy determinations concerning fiscal matters. Second, it frustrates one of the major congressional objectives in enacting the IBA—the removal of certain competitive advantages formerly enjoyed by foreign banks. The Comptroller's interpretation perpetuates these former inequities while simultaneously stripping the states of their ability to regulate their own financial affairs. In providing a unilateral federal charter option for foreign banks which

would not qualify for a state charter, the Comptroller has upset the delicate balance of power between federal and state authorities which is at the heart of our dual banking system.

By expressly deferring to the states in sections 4(a) and 5(a) of the IBA, Congress has preserved for the states their power to assess their economic priorities and to determine not only whether to permit foreign banking within their borders, but also the extent to which such banking should be allowed. For example, if a state's financial needs do not justify full-scale competition by foreign banks, then that state would still be free to authorize foreign bank entry with limitations upon the types of banking activity in which such banks might engage, or with limitations upon the number and location of offices which a foreign bank might open.

Additionally, the extent to which a state's laws require reciprocity as a condition for entry of a foreign bank reflects the degree to which that state's desires for the expansion of its own banks' international business outweighs its interest in the economic benefits of foreign banking. Prior to the adoption of the IBA, several states, including Illinois, had enacted laws restricting foreign bank operations in one or more of these ways. *See*: Appendix C. In enacting the IBA, Congress could have preempted such laws and required uniform national treatment if such action were required to achieve an overriding federal purpose. Congress chose not to preempt state laws in this area because preemption was not required to achieve the goal of the legislation, which was approximate competitive equality between domestic national banks and foreign banks. Since state restrictions upon foreign bank operations were based upon calculations of each state's peculiar needs and circumstances, Congress refrained from imposing a uni-

formity which would achieve absolute equality, but which would also override important state interests and disrupt the efficient allocation of state resources.

Accordingly, sections 4(a) and 5(a) expressly defer to state laws regarding the question of the authorization of foreign banks' activities within each of the states. Thus, the states retain the authority to evaluate their financial needs and determine the blend of opportunities which they will make available to foreign banks. In interpreting the IBA to remove the states' ability to regulate foreign banking, the Comptroller has put the states to the Hobson's choice of either completely prohibiting foreign banking or having no control whatsoever over the extent of foreign banking within their borders, contrary to the intent of Congress.

The legislative history of the IBA confirms that Congress never meant to preempt state authority in this area. For example, in the 1978 Senate Report, S. Rep. No. 95-1073 95th Cong., 2d Sess. it explains that section 5(a) "* * * leaves each State free to decide *whether and to what extent* it wishes to permit foreign banks . . ." to operate. *Id.* at 12. Therefore, the Comptroller's interpretation of this language, which strips the states of their authority to determine the scope of foreign banking they wish to permit, is plainly erroneous. Indeed, this interpretation is strikingly similar to one which the Comptroller adopted concerning the interstate branching restrictions of the McFadden Act, and which this Court struck down as unlawful.

The McFadden Act provides that a national bank may establish only such branches as are specifically authorized to state banks in the state where the national bank is located. When the Comptroller argued (in a manner similar to his "all or nothing" argument here) that he

could authorize all national banks in a state to establish branches by every means if that state permitted any state bank to do so by any means, this Court decisively rejected his argument. Instead, this Court held that a national bank may establish a branch only if a state bank could open the same type of branch under the same circumstances. *First National Bank in Plant City v. Dickinson*, 396 U.S. 122, 130-31 (1969) ("[A national bank] 'branch' may be established only when, where and how state law would authorize a state bank to establish and operate such a branch"); *First National Bank of Logan v. Walker Bank & Trust Co.*, 385 U.S. 252, 258-62 (1966). Similarly, in *Iowa Independent Bankers v. Bd. of Governors of Federal Reserve System*, 511 F.2d 1288, 1296-97 (D.C. Cir.), *cert. den.*, 423 U.S. 875 (1975) the Court of Appeals held that the Douglas Amendment (section 3(d) of the Bank Holding Company Act of 1956, 12 U.S.C. § 1842(d)) authorized Iowa to permit one out-of-state bank holding company (BHC) to acquire an in-state bank without being required to permit *all* out-of-state BHC's to do so. Thus, the Comptroller's "all or nothing" interpretation of sections 4(a) and 5(a) of the IBA flies in the face of prior judicial recognition of congressional deference to state policy determinations under our dual banking system.

The Comptroller's refusal to recognize valid state laws regulating foreign bank operations amounts to no less than a declaration that those laws are invalid under the Supremacy Clause because they have been preempted by the IBA. Clearly, the Comptroller bears a heavy burden of justification for this position in light of the express language of the IBA deferring to state laws. *Plant City*, 396 U.S. at 138 ("[T]he congressional policy of competitive equality with its deference to state

standards [is not] open to modification by the Comptroller of the Currency." *See also: Ray v. Atlantic Richfield Co.*, 435 U.S. 151, 157-58 (1978); *Florida Lime & Avocado Growers, Inc. v. Paul*, 373 U.S. 132 (1963). The Comptroller has not justified his position in this case and, therefore, it was error for the Court of Appeals to adopt his interpretation and nullify valid state laws.

Furthermore, the Comptroller's interpretation conflicts with a major purpose of the IBA. One of the primary congressional objectives in enacting the IBA was the eradication of the "illogical differences in the regulatory treatment of domestic and foreign banks." *Foreign Bank Act of 1975: Hearings Before the Subcommittee on Financial Institutions of the Senate Committee on Banking, Housing and Urban Affairs*, 94th Cong., 2d Sess. 26 at 39 (statement of George W. Mitchell, Vice Chairman, Federal Reserve Board).

Prior to the IBA, foreign banks enjoyed a number of substantial competitive advantages over domestic banks. The Bank Holding Company Act of 1956 (BHCA), 12 U.S.C. §§ 1841-1850 (1956); 26 U.S.C. §§ 1101-1103 (1976) precluded all domestic bank holding companies from engaging in interstate banking acquisitions and certain nonbanking activities effectively prohibiting multistate conglomerate banking. Additionally, the McFadden Act proscribed branching across state lines. 12 U.S.C. § 36. However, these provisions did not apply to the branches and agencies of foreign banks because these entities were not "banks" within the meaning of section 2 of the BHCA. 12 U.S.C. § 1841(c). As a result, foreign banks were able to escape a broad spectrum of federal regulations and restrictions which applied to domestic banking organizations, perhaps the most important of which was the prohibition on interstate branch banking imposed by

the McFadden Act, *supra*, and the Federal Reserve Act, 12 U.S.C. § 321.

Since foreign banks were not subject to these federal restrictions, multistate branch banking became commonplace among foreign banking institutions operating branches and agencies in the United States. Klopstock, *Foreign Banks in the United States: Scope and Growth of Operations*, 55 Fed. Res. Bank of N.Y. Monthly Rev. 140, 141-43 (1973). The language of section 5(a) of the IBA was clearly intended to remove this competitive advantage formerly enjoyed by foreign banks and subject those banks to the same restrictions on interstate branching imposed upon domestic banks.

The Comptroller's interpretation frustrates this objective by permitting foreign banks to open interstate branches contrary to the provisions of applicable state law, thus perpetuating the very inequities which the IBA was designed to eliminate. Since domestic national banks are subject to state restrictions on interstate branching, foreign banks should also be subject to the same restrictions.

Banking is universally recognized as an area which is sensitive and important to the national interest. For example, at least twenty-four countries either totally exclude foreign banking or severely limit entry of foreign banks by barring all but representative offices. *Department of Treasury, Report to Congress on Foreign Government Treatment of U.S. Commercial Banking Organizations*, 79-81, 147 (1979). In contrast, in this country, prior to the adoption of the IBA, foreign banks enjoyed a significant number of regulatory advantages which far outweighed the restrictions placed upon them. The IBA removed the restrictions by offering foreign banks a realistic state-federal charter option and also removed the

advantages by subjecting foreign banks to the same restrictions applied to domestic national banks. *See*: S. Rep. No. 95-1073, *supra*, at 6-12. If foreign banks are allowed to open home state federal branches in states where such branches are not permitted to establish state-chartered branches, and if foreign banks are allowed to establish interstate branches in states which would not permit such banks to establish interstate branches under state charter, then a major congressional objective will be circumvented. Therefore, the Comptroller's interpretation of the IBA should be overturned.

The Court of Appeals recognized that the "overriding objective" of Congress in enacting the IBA was to accord foreign banks "national treatment" in the sense of treating foreign banks as "competitive equals with their domestic counterparts." Appendix A at 23a, 715 F.2d at 606, quoting S. Rep. No. 95-1073, *supra*, at 2. However, the Court of Appeals erroneously failed to follow the policy of national treatment and competitive equality in its interpretation of Section 5(a) of the IBA. The Court acknowledged that, in view of the McFadden Act, 12 U.S.C. § 36, "the Comptroller cannot license interstate branches for domestic national banks." Appendix A at 39a, n. 5, 715 F.2d at 608 n. 5. Similarly, a domestic bank holding company may not make an interstate acquisition of a bank under the Douglas Amendment to the BHCA, 12 U.S.C. § 184(d), without specific state authorization. Thus, as the Court conceded, the Comptroller's interpretation of Section 5(a)—which permits foreign banks to establish interstate federal branches and agencies *without* express state permission and, indeed, *contrary* to express state prohibitions—"has no domestic counterpart." Appendix A at 39a, n. 18, 715 F.2d at 623 n. 18. The Court of Appeals did not, however, make the logical and

correct determination that the Comptroller's interpretation, by creating an important competitive advantage for foreign banks over domestic banks, is contrary to the congressional policy of national treatment as well as the plain meaning and intent of Section 5(a). Instead, Court erroneously concluded that it would be "inappropriate" to judge the Comptroller's interpretation on the basis of national treatment. *Id.*

In fact, the Court of Appeals upheld the Comptroller's interpretation of Section 5(a) solely on the basis of judicial deference to administrative action. Appendix A at 39a, 715 F.2d at 623. However, as the Court of Appeals recognized elsewhere in its opinion when it struck down the Comptroller's construction of Section 4(d) of the IBA, no deference is due to the Comptroller when, as here, he promulgates regulations that are "inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute." Appendix A at 45a, 23, 715 F.2d at 626, n. 23, *quoting NLRB v. Brown*, 380 U.S. 278, 291 (1965).

The Comptroller's interpretation of Section 5(a) of the IBA is contrary to the congressional policy of national treatment as well as the express language and manifest intent of the statute. Similarly, the Comptroller's interpretation of Section 4(a) imposes an "all or nothing" choice upon the states which plainly violates the objective of Congress to preserve to the states their authority to regulate the extent of foreign bank activities within their borders. Accordingly, Court of Appeals clearly erred when it upheld the Comptroller's regulatory constructions of Sections 4(a) and 5(a) of the IBA.

CONCLUSION

For the above stated reasons, it is respectfully submitted that this petition for a writ of certiorari to the United States Court of Appeals for the District of Columbia Circuit should be granted.

Respectfully submitted,

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APPENDIX A

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 81-2256

CONFERENCE OF STATE BANK SUPERVISORS, ROBERT ABRAMS, ATTORNEY GENERAL OF THE STATE OF NEW YORK, ET AL., APPELLANTS

v.

C.T. CONOVER, COMPTROLLER OF THE CURRENCY OF THE UNITED STATES

Appeal from the United States District Court for the District of Columbia

(D.C. Civil Action No. 80-03284)

Argued June 2, 1982

Decided August 9, 1983

Arthur E. Wilmarth, Jr., with whom *James F. Bell* for Conference of State Bank Supervisors, *Corinne J. Gieseke*, Special Assistant Attorney General, State of Illinois, for People of the State of Illinois *ex rel.* William C. Harris, *Howard L. Zwickel*, Assistant Attorney General, State of New York, for Robert Abrams, Attorney General of the State of New York, and *William L. Williams*, Assistant Attorney General, State of Washington, for State of Washington *ex rel.* Michael D. Edwards, were on the brief for appellants.

R. Craig Lawrence, Assistant United States Attorney, with whom *Stanley S. Harris*, United States Attorney, *Royce C. Lamberth* and *Whitney Adams*, Assistant United States Attorneys, and *Ronald R. Glancz*, and *L. Robert Griffin*, Attorneys, Office of the Comptroller of the Currency, were on the brief for appellee.

Leonard J. Theberge for Chicago Association of Commerce and Industry, Illinois Bankers Association, Independent Community Banks in Illinois, and Mid-America Legal Foundation, were on the brief for *amici curiae*, urging reversal.

Before: TAMM, *Circuit Judge*, ROBB, *Senior Circuit Judge*, and FAIRCHILD,* *Senior Circuit Judge*, United States Court of Appeals for the Seventh Circuit.

Opinion for the Court filed by *Senior Circuit Judge* ROBB.

ROBB, *Senior Circuit Judge*: The appellants[1] are state officials responsible for regulation of state-licensed banking institutions. As plaintiffs in the District Court they sued for declaratory and injunctive relief, challenging regulations 12 C.F.R. §§ 28.2(b)-(d), 28.3, & 28.4 (1980) and a portion of an accompanying interpretative statement (44 Fed. Reg. 65381-87 (1979)) adopted by the Comptroller of the Currency pursuant to the International Banking Act of 1978 (IBA). 12 U.S.C. §§ 3101-3108 (Supp. V 1981). Appellants contended that the regulations and statement conflicted with the IBA because they permitted a foreign bank to establish and operate offices where prohibited by state law. In an unreported opinion the District Court

* Sitting by designation pursuant to 28 U.S.C. § 294(d) (Supp. V 1981).

[1] Conference of State Bank Supervisors; Robert Abrams, Attorney General of the State of New York; State of Washington *ex rel.* Michael D. Edwards, State Supervisor of Banking; People of the State of Illinois *ex rel.* William C. Harris, Commissioner of Banks and Trust Companies.

granted summary judgment in favor of the Comptroller. *Conference of State Bank Supervisors v. Heimann*, No. 80-3284 (D. D.C. Sept. 30, 1981); Joint Appendix (J.A.) 96-109.

I.

To engage in the banking business in the United States, a domestic bank may be chartered under state law, subject to the exclusive regulation of the state, or it can operate under a federal charter subject to federal law that in part defers to state law.[2] Prior to the adoption of the IBA a bank organized under the laws of a foreign country could obtain a charter from a state authority only; the federal government did not charter foreign banks. H.R. Rep. No. 910, 95th Cong., 2d Sess. 5 (1978) [hereinafter cited as *1978 House Report*]. The absence of federal involvement caused treatment of foreign banks in the United States to differ from state to state. Commenting on this pre-IBA treatment of foreign banks, the Senate Committee on Banking, Housing and Urban Affiars, noted in 1978:

> There is, at this time, no uniform national policy concerning foreign banking operations in this country. As a result, foreign banks enjoy many competitive advantages over our domestic banks. This bill establishes the principle of parity of treatment between foreign and domestic banks in like circumstances.

S. Rep. No. 1073, 95th Cong., 2d Sess. 2 (1978), *reprinted in* 1978 U.S. Code Cong. & Ad. News 1421, 1422 [hereinafter cited as 1978 Senate Report].

The IBA sought to provide foreign banks with "national treatment" under which "foreign enterprises . . . are

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[2] *See* 12 U.S.C. §§ 21 *et seq.* (1976 and Supp. V 1981). To receive deposits in the United States, a bank must be chartered or be given permission to operate by the federal or a state government. 12 U.S.C. § 378(a)(2) (Supp. V 1981).

treated as competitive equals with their domestic counterparts." *1978 Senate Report, supra*, at 2. *See also International Banking Act of 1978: Hearings on H.R. 10899 before the Subcomm. on Financial Institutions of the Senate Comm. on Banking, Housing and Urban Affairs*, 95th Cong., 2d Sess. 64 (1978); *1978 Senate Report, supra* at 18; *1978 House Report, supra*, at 5, 7, 8; 124 Cong. Rec. 26733 (1978) (remarks of Congressman Reuss). In other words, the IBA "establishes the principle of parity of treatment between foreign and domestic banks in like circumstances." *1978 Senate Report, supra*, at 2. In general the IBA provides that "with the approval of the Comptroller" a foreign bank may establish a branch or agency in a state, 12 U.S.C. § 3102(a) (Supp. V 1981) and that

> [e]xcept as otherwise specifically provided in this chapter or in rules, regulations, or orders adopted by the Comptroller under this section, operations of a foreign bank at a Federal branch or agency shall be conducted with the same rights and privileges as a national bank at the same location and shall be subject to all the same duties, restrictions, penalties, liabilities, conditions, and limitations that would apply under the National Bank Act to a national bank doing business at the same location . . . .

IBA, § 4(b), 12 U.S.C. § 3102(b) (Supp. V 1981).

In this case the controversy centers on the Comptroller's interpretation of certain provisions of sections 4 and 5 of the IBA. Section 4(a), 12 U.S.C. § 3102(a) (Supp. V 1981), provides that the Comptroller may approve establishment of a foreign bank's federal branch or agency if "establishment of a branch or agency, as the case may be, by a foreign bank is not prohibited by State law." Section 4(d), 12 U.S.C. § 3102(d) (Supp. V 1981), reads: "Notwithstanding any other provision of this section, a foreign bank shall not receive deposits . . . at any Federal agency." When a foreign bank opens a federally-chartered

branch or agency outside of its home state,[3] section 5(a)(1), 12 U.S.C. § 3103(a)(1) (Supp. V 1981), provides that with certain exceptions "no foreign bank may directly or indirectly establish and operate a Federal branch outside of its home State unless (A) its operation is expressly permitted by the State in which it is to be operated . . . ." Section 5(a)(3), 12 U.S.C. §3103(a)(3) (Supp. V 1981), likewise forbids a foreign bank to establish and operate a federal agency outside of its home state "unless its operation is expressly permitted by the State in which it is to be operated . . . ."

Section 1(b) of the IBA sets out the definition of terms used in the statute. So far as pertinent here, they are:

> (1) "agency" means any office or any place of business of a foreign bank located in any State of the United States at which credit balances are maintained incidental to or arising out of the exercise of banking powers, checks are paid, or money is lent but at which deposits may not be accepted from citizens or residents of the United States;
>
> * * * *
>
> (3) "branch" means any office or any place of business of a foreign bank located in any State of the United States at which deposits are received;
>
> * * * *
>
> (5) "Federal agency" means an agency of a foreign bank established and operating under section [4] of this [Act];

[3] The "home state" of a foreign bank is determind in accordance with Section 5(c) of the IBA and regulations issued by the Federal Reserve Board (12 C.F.R. § 211.22 (1983)), and generally is the first state in which the foreign bank establishes a branch that accepts deposits from domestic customers.

> (6) "Federal branch" means a branch of a foreign bank established and operating under section [4] of this [Act] . . . .

12 U.S.C. § 3101(1), (3), (5), (6) (Supp. V 1981).

The appellants complain that the Comptroller erred in interpreting these provisions of the IBA. They say that the Comptroller violated section 4(a) by approving the applications of five Australian banks to convert their state-licensed agencies in New York to home state federal branches although New York law prohibits such banks from opening branches. The appellants say that the Comptroller violated section 5(a) by approving the applications of two of the Australian banks to open interstate federal branches in Illinois in contravention of Illinois law. In the appellants' view, the Comptroller also violated section 5(a) by authorizing a British bank's interstate federal branch located in the State of Washington to conduct business operations that are not permitted to foreign bank branches under Washington law. Finally, the appellants aver that the Comptroller incorrectly interpreted sections 1(b)(5) and 4(d) in permitting federal agencies of foreign banks to accept deposits if the depositors are neither citizens nor residents of the United States.

II

In discussing to the public comments regarding 12 C.F.R. pt. 28 (1980), promulgated pursuant to sections 4 and 13(a) of the IBA, 12 U.S.C. §§ 3102, 3108(a) (Supp. V 1981), the Comptroller noted "that in some states a foreign bank which applies for a state branch or agency must be able to demonstrate that the country under whose laws it was organized permits free or at least equivalent access to U.S. banks." 44 Fed. Reg. 65382 (1979). The Comptroller concluded however that "such a reciprocity approach" is not "binding upon the Comptroller's Office because it is incompatible with the national treatment theme of the IBA, and, further, it is in the nature of a condition or limitation rather than a pro-

hibition on foreign entry." *Id.* The Comptroller bases this interpretation on his construction of the language of section 4(a) of the IBA, 12 U.S.C. § 3102(a) (Supp. V 1981), which provides:

> Except as provided in section [5] of this [Act], a foreign bank which engages directly in a banking business outside the United States may, with the approval of the Comptroller, establish one or more Federal branches or agencies in any State in which (1) it is not operating a branch or agency pursuant to State law and (2) the establishment of a branch or agency, as the case may be, by a foreign bank is not prohibited by State law.

The Comptroller reasons that the words "a foreign bank" in subsection (2) are synonomous with "any foreign bank" so that the Comptroller can license a foreign bank to operate a federal branch in a particular state unless that state prohibits all foreign banks from establishing state chartered branches. Likewise, the Comptroller contends he can license a foreign bank to operate a federal agency in a particular state unless that state prohibits all foreign banks from establishing state-chartered agencies. *See* 44 Fed. Reg. 65382 (1979); Brief for Appellee at 11.

The appellants complain that by applying this construction of section 4(a) the Comptroller has approved the applications of five Australian banks to convert their state-licensed agencies in New York to home state federal branches although New York's bank reciprocity law[4] prohibits such banks from opening branches. Brief of Appellants at 21 & n.25; J.A. 13, 15 (Complaint); *id.* 72 (Plaintiff's Amended Statement of Material Facts as to Which There Is No Genuine Issue). The appellants assert that the Comptroller erred in approving these applications. They argue that Congress in the IBA allowed the Comptroller to charter a foreign bank's office only in a state

[4] N.Y. Banking Law § 202-a(2) (McKinney 1982).

where that particular foreign bank is not prohibited from establishing state-chartered offices under state law. Brief of Appellants at 11.

The District Court agreed with the Comptroller's interpretation of section 4(a). The court said:

> A principal purpose of the 1978 Act was to give foreign banks "an important new option" in doing business in the United States; Congress understood that the federal chartering option might give overseas banks "opportunities which they do not now possess," even though it would also place new burdens of federal regulation on them. *See* Remarks of Mr. St. Germain, 122 Cong. Rec. 24403 (July 29, 1976). Plaintiffs' view of the Comptroller's authority would in effect nullify the federal option. A foreign bank, under plaintiffs' interpretation, would have a choice between compliance with State regulations under a State charter, and compliance with State *and* federal rules under a federal charter.

J.A. 100.[5]

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[5] Appellants argue that the District Court misunderstood their position. The appellants contend here, as they did before the District Court, that under the dual banking system embodied in the IBA a foreign bank may obtain a federal charter only if it could have obtained a state charter. They submit, however, that, contrary to the District Court's analysis, they do not seek to require the Comptroller to observe a state's discretionary chartering criteria. Rather, they contend only that the Comptroller must

> observe specific and general state *prohibitions* on foreign bank entry, *i.e.*, those state laws which bar entry by one or more foreign banks and which the affected banks have no power to cure by their own efforts. State capital adequacy requirements and similar "chartering standards," which foreign banks can take action to satisfy, (*e.g.*, by raising more capital), are *not* "prohibitions" within the meaning of Sections 4(a) and 5(a).

Reply Brief of Appellants at 15 (emphasis in original). The Comptroller counters that section 4(c), 12 U.S.C. § 3102(c) (Supp. V 1981)

(Footnote continued on following page)

A

In support of their construction of the statute the appellants refer us to the legislative background of section 4(a). They direct our attention first to S. 958, 94th Cong., 1st Sess., 121 Cong. Rec. 5280 (1975), a bill the Federal Reserve Board submitted to the 94th Congress. This bill, introduced March 5, 1975, provided for federal regulation of foreign bank entry and operation in the United States. Section 18(b) of the bill provided in part:

> Notwithstanding the laws of any State, any foreign bank may, upon receipt of a certificate of authority from the Comptroller . . . establish and operate one or more branches in any State . . . ."

Identical language appeared in H.R. 5617, 94th Cong., 1st Sess. (1975) introduced March 26, 1975. Testifying in sup-

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[5] *continued*

(*see infra* note 15), contains the exclusive chartering requirements for foreign banks seeking to establish a federal branch or agency under section 4(a), and that state reciprocity laws are not "prohibitions" under section 4(a)(2). Brief for Appellee at 14-15.

We believe the District Court understood appellants' interpretation and merely extended that interpretation to its logical conclusion. Section 4(a) allows the Comptroller to charter a foreign bank's branch or agency unless, among other things, the establishment of a foreign branch or agency "is prohibited by state law." A state law that bars the establishment of a foreign branch or agency would seem a "state prohibition" whether the law was grounded on a failure to meet state chartering standards or on the failure to meet state reciprocity requirements. In either case, the state law would "prohibit" the foreign bank from opening a state-chartered office, and under the appellants' view of section 4(a), the foreign bank would therefore lose its option to seek a federal charter. We agree with the District Court that it would be inconsistent with the IBA's dual banking system concepts to require federal charter applicants to comply with both state and federal chartering standards. In addition, while appellants' definition of "state prohibition" would lessen this inconsistency, the legislative history contains no evidence that Congress intended the Comptroller to observe only those requirements in state law that "the affected banks have no power to cure by their own efforts."

port of the S. 958 before the Subcommittee on Financial Institutions of the Senate Committee on Banking, Housing, and Urban Affairs, Vice Chairman Mitchell of the Board of Governors of the Federal Reserve System said:

> The current pattern of State regulation may . . . in some cases, lead to anticompetitive and other results not in the national interest. For example, a foreign bank may not be able to enter a U.S. banking market because of State law restrictions. This situation could in some cases prevent a domestic bank from that State from entering a foreign bank's home country if the home country imposes a reciprocity requirement. . . . Clearly, a national policy and national regulatory system are needed so questions of reciprocity, as well as other matters of national interest, can be judged on a national, not local level.

Foreign Bank Act of 1975: Hearings on S. 958 Before the Subcomm. on Financial Institutions of the Senate Comm. on Banking, Housing, and Urban Affairs, 94th Cong., 2d Sess. 45-46 (1976). A representative of the Conference of State Bank Supervisors (CSBS), an appellant in this case, expressed a contrary view:

> CSBS opposes proposals in S. 958 which would permit a federally licensed foreign facility to operate in a State, regardless of whether this might contravene State law.
>
> It is the position of CSBS that a State should have the authority to structure the finanical institutions within its borders in a manner which it believes best serves the needs and interests of its residents, and that in the absence of some compelling national interest—which we do not believe present in this situation—the Federal Government should not preempt State statutes or regulations in this area.

Id. at 345. S. 958 and H.R. 5617 both died in committee.

Next, the appellants cite H.R. 12103, 94th Cong., 2d Sess. (1976), introduced February 25, 1976 and entitled "International Banking Act of 1976." H.R. 12103 in section 104(a) provided that "a foreign bank may, with the approval of the Comptroller, establish a Federal branch in any State in which (1) it is not operating a branch pursuant to State law and (2) the establishment of a branch by a foreign bank is not prohibited by State law." This bill died in committee.

A provision similar to section 4(a) of the International Banking Act of 1978 first appeared as section 4(a) of H.R. 13876, 94th Cong., 2d Sess. (1976), introduced May 18, 1976. H.R. 13876 passed the House July 29, 1976 but died in committee in the Senate. The House report on the bill, H.R. Rep. No. 1193, 94th Cong., 2d Sess. 12 (1976), states:

> *Section 4. Federal branches and agencies*
>
> Subsection (a) provides that the Comptroller is authorized to approve the establishment of a Federal branch or agency by a foreign bank in a state where it is not already operating a branch or agency under state law and where state law does not prohibit the establishment of a foreign branch or agency.

The language of section 4(a) of H.R. 13876 appeared again in H.R. 7325, 95th Cong., 1st Sess. (1977), introduced May 23, 1977. The appellants cite a comment by Chairman Arthur Burns of the Federal Reserve System in a letter to Congressman St. Germain, who introduced the bill:

> [W]e do not believe that the States should have the authority in section 4 of the IBA to veto the entry of a Federal branch or agency. Such a State veto is not permitted in the case of the establishment of national banks or Edge Corporations, or even under the Bank Holding Act, and would thus represent a clear departure from the traditional operation of our dual-banking system. It may also serve to restrict both the development of and competition in new international banking markets in this country. We recom-

> mend therefore that State bank authorities instead be given a consultative role on Federal branch or agency entrance into their State.

International Banking Act of 1977: Hearings on H.R. 7325 before the Subcomm. on Financial Institutions Supervision, Regulation and Insurance of the House Comm. on Banking, Finance, and Urban Affairs, 95th Cong., 1st Sess. 107 (1977). The appellants also point to the testimony of Governor Gardner of the Federal Reserve System at the hearings:

> Mr. Annunzio. Can you explain if any of our national objections [sic objectives?] have been impeded by State or city of [sic] foreign banking activity?
>
> Governor Gardner. You ask me a very sensitive question. New York has a reciprocity law and in that reciprocity law the State Legislature of New York decided a long time ago that if New York banks can't accept deposits in a country abroad, the foreign banks from that country can't continue branch banking operations in New York. That is part of the law of New York State.
>
> Let me just say this: I don't think the United States should have international reciprocity banking policies in 50 different State capitals. It doesn't really make much sense. I don't object to New York's law, but I point it out as something unusual.

Id. at 146. At these hearings on H.R. 7325, a representative of Appellant CSBS reaffirmed that organization's opposition to the federal chartering of foreign bank offices in contravention of state law. *Id.* at 310. H.R. 7325 was never reported out of committee.

Finally, appellants turn to H.R. 10899, 95th Cong., 2d Sess. (1978), introduced February 9, 1978. This bill became the International Banking Act of 1978. The appellants cite the comment on section 4 of the Act that appears in a letter from Chairman Miller of the Board of Governors of the Federal Reserve System to Senator Proxmire,

Chairman of the Senate Committee on Banking, Housing, and Urban Affairs, as follows:

> Federal branches and agencies would only be permitted in a State in which the foreign bank does not operate a State branch or agency *and* which does not by law prohibit the establishment of branches and agencies of foreign banks. In effect, this provision permits States to veto the establishment of federally-sanctioned banking offices. This result is a clear departure from the dual banking system. The Board recommends that States be afforded a consultative role on the establishment of Federal branches and agencies but that the States not be placed in a position of vetoing such offices.

International Banking Act of 1978: Hearings on H.R. 10899 Before the Subcomm. on Financial Institutions of the Senate Comm. on Banking, Housing, and Urban Affairs, 95th Cong., 2d Sess. 391 (1978) (Letter dated June 1, 1978 from Chairman G. William Miller to Senator Proxmire) (emphasis in original). Appellants also direct us to portions of the House and Senate committee reports that accompanied the IBA. The Senate report stated:

> Section 4 provides that, subject to the approval of the Comptroller of the Currency, a foreign bank may establish a Federal branch or agency in any State where it does not already operate a State-licensed branch or agency, and in which the establishment of a branch or agency is not prohibited by State law. This insures that in States where foreign banks are welcome, they will have a State-Federal option.

1978 Senate Report, *supra*, at 6. The House committee report likewise stated: "While recognizing that current regulation of foreign banks is in the hands of the States, and providing a framework which will allow this to continue, the bill also provides the option of Federal chartering." *1978 House Report*, *supra*, at 5.

Appellants argue that Congress rejected S. 958 in response to the testimony of state banking regulators

seeking to preserve state reciprocity requirements. Thus, in appellants' view, rejection of S. 958 evidences Congressional support for state reciprocity laws. In addition, they note that while the IBA and its forerunners were in committee, the Federal Reserve Board objected to any state veto power over the entry of federally-chartered foreign banks. Congress, however, did not change the bills in response to these objections. Appellants argue that Congress' refusal to change the bills provides further evidence that Congress was acting in accord with appellants' testimony that the Comptroller be required to observe state reciprocity laws. Appellants, therefore, contend that section 4(a) requires the Comptroller to observe these laws.

The Comptroller counters by pointing to an amendment to the IBA proposed by Representative Grassley of Iowa. That amendment caused an earlier version of section 9(a) to read in part as follows:

> The Secretary of the Treasury in issuing guidelines under this section, and the Federal regulatory agencies in the administration of this Act, shall seek to achieve a parity of treatment for foreign banks, branches, agencies, and commercial lending companies relative to their domestic counterparts. It is the purpose of this Act to establish a basic statutory framework which, given due consideration to the structure of our domestic monetary mechanisms and our national interests will, to the extent practical, allow foreign banking institutions to have the same rights, duties, and privileges and be subject to the same limitations, restrictions, or conditions as our domestic banking institutions, *but the Secretary of the Treasury is authorized and directed to take into account the treatment by foreign governments of financial institutions domiciled in the United States which do business in their respective countries.*

See International Banking Act of 1978: Hearings on H.R. 10899 before the Subcomm. on Financial Institutions of the Senate Comm. on Banking, Housing, and Urban Af-

fairs, 95th Cong., 2d Sess. 341-42 (1978) (House-passed version of section 9 with emphasis added to show Grassley Amendment); *1978 House Report*, *supra*, at 4 (Grassley Amendment); 124 Cong. Rec. 9084 (1978) (remarks of Congressman Grassley). The House Committee on Banking, Finance, and Urban Affairs adopted this amendment, believing that "the principle of reciprocity should . . . be taken into account," *1978 House Report*, *supra*, at 13, and the full House passed this version. *See* 124 Cong. Rec. at 9103 (1978). The Senate, however, passed a substantially revised version of section 9, deleting the Grassley Amendment. *See* 124 Cong. Rec. at 26128 (1978). Neither the report from the Senate Committee on Banking, Housing, and Urban Affairs, (*1978 Senate Report*, *supra*) nor the legislative debate in the Senate explain the deletion. The House concurred in the Senate version. *See* 124 Cong Rec. at 26726-34 (1978). The Comptroller contends that rejection of the Grassley Amendment signalled Congressional rejection of reciprocity as a chartering standard for federal offices of foreign banks.

With respect to the parties' arguments concerning the legislative history, the District Court stated:

> Because Congress intended to accord national treatment to foreign banks that sought the benefits and burdens of federal control, it was proper for the Comptroller to deem the proviso of section 4(a) only to allow States to permit or to veto federally-chartered offices, and not to condition their entry. As the 1978 Senate Report observed, section 4 "insures that in States where foreign banks are welcome, they will have a State-Federal option." *Id.* Section 4 thus extended the federal option to those States, in the Report's words, "where foreign banks are welcome," not where particular banks, or where banks from particular countries, are welcome.
>
> Revisions in the text of the Act prior to final passage in 1978, said by both parties to support their own views of section 4(a), are treacherous guides for

interpretation of the Act. The fact that Congress rejected a 1975 version of the Act, S. 958, that would have wholly denied the States the veto power that section 4(a) grants them does not, in itself, demonstrate that section 4(a) granted the States something other than the veto power the Comptroller concedes. Similarly, the opposition of federal banking authorities to any provision that would make state reciprocity requirements a part of the new international banking law, voiced at hearings on H.R. 7325 in 1977, cannot provide proof that they assumed that section 4(a) would have such a feature. *See International Banking Act of 1977: Hearings on H.R. 7325 Before the Subcomm. on Financial Institutions Supervision, Regulation, and Insurance of the House Comm. on Banking, Housing, and Urban Affairs*, 95th Cong., 1st Sess. (1977) 39-41 (remarks of Federal Reserve Board Governor Gardner). Defendant, on the other hand, attempts to rely upon the rejection of the so-called "Grassley amendment" in 1978, which would have authorized federal officials to consider treatment of American financial institutions in the home country of a foreign bank in deciding whether to charter that bank in the United States. It is arguable, as defendant suggests, that Rep. Grassley would not have proposed such a program for federal enforcement of national reciprocity if he thought State reciprocity was already a part of the Act. But, as an expression of the intent of Congress as a whole, the final terms of section 4 and the broad design of the Act appearing elsewhere in the legislative history provide a more substantial basis for the Comptroller's rejection of plaintiffs' argument.

J.A. 100-01.

Appellants also contend that Congress intended section 4(a) to maintain "the states' preexisting power to determine the structure of foreign banking institutions within their borders . . . ." Brief of Appellants at 27. In the appellants' view, in passing section 4(a) Congress "con-

sciously followed" the policies of a dual banking system found in the Douglas Amendment to the Bank Holding Company Act of 1956, 12 U.S.C. § 1842(d) (Supp. V 1981), and in the McFadden Act, 12 U.S.C. § 36 (1976). Brief of Appellants at 27. The Douglas Amendment provides:

> Notwithstanding any other provision of this section, no application (except an application filed as a result of a transaction authorized under section 13(f) of the Federal Deposit Insurance Act) shall be approved under this section which will permit any bank holding company or any subsidiary thereof to acquire, directly or indirectly, any voting shares of, interest in, or all or substantially all of the assets of any additional bank located outside the State in which the operations of such bank holding company's banking subsidiaries were principally conducted on July 1, 1966, or the date on which such company became a bank holding company, whichever is later, unless the acquisition of such shares or assets of a State bank by an out-of-State bank holding company is specifically authorized by the statute laws of the State in which such bank is located, by language to that effect and not merely by implication. For the purposes of this section, the State in which the operations of a bank holding company's subsidiaries are principally conducted is that State in which total deposits of all such banking subsidiaries are largest.

12 U.S.C. § 1842(d) (Supp. V 1981).

Appellants argue that the Douglas Amendment and section 4(a) reflect similar policies; both grant a state the power to control which banking institutions organized outside of its borders may enter that state. They direct our attention to the language of the Douglas Amendment which states that the Board of Governors of the Federal Reserve System shall not approve a bank holding company's application to acquire any voting shares or substantially all the assets of a bank located outside the state in which the operations of the bank holding company are

principally conducted "unless the acquisition of such shares or assets of *a* State bank by *an* out-of-State bank holding company is specifically authorized by the statute laws of the State in which such bank is located . . . ." 12 U.S.C. § 1842(d) (Supp. V 1981) (emphasis added). Appellants note the similarity between the quoted language in the Douglas Amendment and the analogous proviso in section 4(a)(2). *See* 12 U.S.C. § 3102(a)(2) (Supp. V 1981) ("the establishment of a branch or agency . . . by a foreign bank is not prohibited by State law"). They then refer us to *Iowa Independent Bankers v. Board of Governors of the Federal Reserve System*, 167 U.S. App. D.C. 286, 511 F.2d 1288, *cert. denied*, 423 U.S. 875 (1975), a case involving the Douglas Amendment in which this court rejected arguments similar to those the Comptroller has made in this case to support his interpretation of section 4(a). In the *Iowa Independent Bankers* case, an organization of Iowa bankers argued that the Douglas Amendment did not permit the states to discriminate among out-of-state bank holding companies when deciding which bank holding companies could enter that state. The bankers argued that the states could prohibit all out-of-state bank holding companies from entering or it could prohibit none. *Id.* at 294, 511 F.2d at 1296. This court rejected that argument, ruling that the Douglas Amendment empowered states to discriminate among out-of-state bank holding companies when deciding which could enter. *Id.* at 295, 511 F.2d at 1297. Appellants argue that section 4(a) uses the same "statutory formulation" as the Douglas Amendment and should be interpreted similarly. *See* Reply Brief of Appellants at 10. The District Court did not address this argument.

Appellants also argue that in enacting the IBA, Congress sought to apply the policies of the McFadden Act, 12 U.S.C. § 36(c) (1976),[6] to the entry of a federally-

[6] 12 U.S.C. § 36(c) (1976) provides:

A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new

(Footnote continued on following page)

chartered foreign bank into its home state. The McFadden Act provides that the Comptroller may approve a national bank's application to establish an additional branch office in the state of its principal office only if that state's laws would authorize a state-chartered bank to open such an additional branch office. *See First National Bank of Logan v. Walker Bank & Trust Co.*, 385 U.S. 252, 258-62 (1966).

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[6] *continued*
branches: (1) Within the limits of the city, town or village in which said association is situated, if such establishment and operation are at the time expressly authorized to State banks by the law of the State in question; and (2) at any point within the State in which said association is situated, if such establishment and operation are at the time authorized to State banks by the statute law of the State in question by language specifically granting such authority affirmatively and not merely by implication or recognition, and subject to the restrictions as to location imposed by the law of the State on State banks. In any State in which State banks are permitted by statute law to maintain branches within county or greater limits, if no bank is located and doing business in the place where the proposed agency is to be located, any national banking association situated in such State may, with the approval of the Comptroller of the Currency, establish and operate, without regard to the capital requirements of this section, a seasonal agency in any resort community within the limits of the county in which the main office of such association is located, for the purpose of receiving and paying out deposits, issuing and cashing checks and drafts, and doing business incident thereto: *Provided*. That any permit issued under this sentence shall be revoked upon the opening of a State or national bank in such community. Except as provided in the immediate preceding sentence, no such association shall establish a branch outside of the city, town, or village in which it is situated unless it has a combined capital stock and surplus equal to the combined amount of capital stock and surplus, if any, required by the law of the State in which such association is situated for the establishment of such branches by State banks, or, if the law of such State requires only a minimum capital stock for the establishment of such branches by State banks, unless such association has not less than an equal amount of capital stock.

The district court rejected this argument, stating:

> The McFadden Act itself is irrelevant to the Congressional design in section 4(a), which only governs entry of foreign banks into the United States market under federal charter; in furtherance of its policy favoring parity for foreign and domestic banks holding federal charters, Congress elsewhere expressly adopted McFadden Act principles by providing in section 4(h) of the 1978 Act that intrastate branching by federally-chartered foreign banks should occur under the same rules as those applicable to domestic national banks. Congress thus appears to have well understood the reach of the McFadden Act, and to have chosen in the 1978 Act to limit the McFadden Act's force to intrastate branching.

J.A. 102.

B

The language of section 4(a) does not preclude either of the proffered interpretations. Moreover, we believe the legislative history of the IBA does not offer clear guidance on the meaning of section 4(a). Admittedly, S. 958, which allowed a state no control over a federally-chartered foreign bank's entry, died in committee, and section 4(a), which allowed a state some control over entry was enacted. As the District Court correctly noted, these facts alone do not establish that section 4(a) granted the states a veto power greater than the veto power, conceded by the Comptroller, to prohibit the entry of *all* foreign banks. We are hesitant to accord weight to Congress' unexplained inaction on S. 958. *See generally Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 381 n.11 (1969); *FTC v. Dean Foods Co.*, 384 U.S. 597, 609-10 (1966). Similarly, Federal Reserve Board Chairman Burns' letter and Board Governor Gardner's testimony, included in the H.R. 7325 hearings, and Board Chairman Miller's letter, submitted during the H.R. 10899 hearings, do not conclusively demonstrate that the Board believed section 4(a) granted

the states more veto power than the Comptroller concedes. Moreover, appellants do not refer us to any other part of the IBA's legislative history where the Federal Reserve Board's objection is more conclusively explained, or even mentioned. Even if the Board interpreted section 4(a) as appellants now do, this single reference hardly provides substantial evidence that Congress adopted this interpretation "since the views expressed by witnesses at congressional hearings are not necessarily the same as those of the legislators ultimately voting on the bill." *Austasia Intermodal Lines, Ltd. v. FMC*, 188 U.S. App. D.C. 379, 382, 580 F.2d 642, 645 (1978) (citations omitted). The House and Senate committee reports cited by appellants likewise do not clearly support one interpretation over the other. The Senate report states that "where foreign banks are welcome, they will have a State-Federal option." *1978 Senate Report*, *supra*, at 6 (emphasis added). Contrary to the appellants' view, this passage seems to indicate that the availability of a foreign bank's "federal option" will be predicated on a state's decision to welcome foreign banks generally, and not on a state's decision to welcome a particular foreign bank. The House report cited by appellants states only that the IBA will allow the states to continue their regulation of foreign banks. *1978 House Report*, *supra*, at 5. There is no dispute, however, that the IBA ends the states' exclusive regulation of foreign banking, and yet, the cited portion of the *1978 House Report* offers no view as to what state regulatory power over foreign banks survives the IBA's passage. Lastly, Congress' failure to adopt the Grassley Amendment provides little insight in analyzing section 4(a). The Comptroller may be correct that Congress rejected the Grassley Amendment because it rejected reciprocity as a federal chartering criterion; however, as appellants contend, Congress may have rejected the Grassley Amendment simply because it preferred the enforcement of state reciprocity requirements already incorporated in section 4(a) to the creation of a uniform reciprocity policy at the federal level. In sum, we find unconvincing both appellants' and appellee's arguments based on the legislative background

of the IBA, and decline to rest our resolution of the section 4(a) issue on such meager grounds.

The District Court did not address appellants' argument with respect to the Douglas Amendment, but we find it without merit. We believe *Iowa Independent Bankers* is distinguishable from this case. The court there suggested several reasons for its refusal to adopt an all-or-nothing interpretation of a state's veto power over an out-of-state bank holding company's decision to acquire an in-state bank. First, the court noted "that nothing in the language of section 1842(d) points to this [all-or-nothing interpretation] . . . ." 167 U.S. App. D.C. at 294, 511 F.2d at 1296. Here, however, the language of section 4(a) at least suggests that states were not given the power to discriminate in allowing foreign banks to enter. Section 4(a) provides:

> Except as provided in section [5] of this [Act], a foreign bank which engages directly in a banking business outside the United States may, with the approval of the Comptroller, establish one or more Federal branches or agencies in any State in which (1) it is not operating a branch or agency pursuant to State law and (2) the establishment of a branch or agency, as the case may be, by a foreign bank is not prohibited by State law.

12 U.S.C. § 3102(a) (Supp. V 1981). Congress begins this section by referring generally to a "foreign bank." In subsection (1), it narrows the focus to a particular bank: "[A] foreign bank . . . may . . . establish one or more Federal branches or agencies in any State in which (1) *it* is not operating a branch or agency pursuant to State law . . . ." *Id.* (emphasis added). In subsection (2), however, Congress refers simply to "a foreign bank" again; it does not follow through with the specific reference contained in subsection (1). While this difference is not dispositive, it does support the Comptroller's interpretation.

The second reason given in *Iowa Independent Bankers* was that an all-or-nothing interpretation of the Douglas

Amendment conflicted with section 7 of the Bank Holding Company Act, 12 U.S.C. § 1846 (1976). 167 U.S. App.D.C. at 294, 511 F.2d at 1296. That section provides:

> The enactment by the Congress of this chapter shall not be construed as preventing any State from exercising such powers and jurisdiction which it now has or may hereafter have with respect to banks, bank holding companies, and subsidiaries thereof.

We find no comparable section in the IBA. Lastly, the court found that the legislative history demonstrated that Congress intended to allow a state to discriminate in admitting bank holding companies. 167 U.S. App.D.C. at 294-95, 511 F.2d at 1296-97. As discussed above, however, the legislative history of the IBA does not provide explicit support for a similar interpretation of section 4(a).

In short, we find two arguably correct interpretations of an ambiguous statutory provision. The relevant legislative history contains no explicit support for either interpretation. Under these circumstances, we believe section 4(a) can only be interpreted in the light of Congress' overriding objective in enacting the IBA. We find the legislative history replete with references to Congress' intent to accord foreign banks national treatment, under which "foreign enterprises . . . are treated as competitive equals with their domestic counterparts." *1978 Senate Report, supra*, at 2. The House Report accompanying H.R. 10899 stated:

> The bill incorporates two principal policy objectives. The first objective is to provide a system of Federal regulation of foreign banking activities. . . . The second objective is to provide to the extent possible or appropriate equal treatment for foreign and domestic banks operating in the United States.

1978 House Report, supra, at 5.

> [T]he objectives of this legislation are to provide Federal regulation of foreign banks and to insure equal treatment for foreign and domestic banks op-

> erating in the United States. But there is recognition of the fact that the same regulatory structure for foreign and domestic banks will not result in equal treatment and that discretion is needed to devise a regulatory framework which is appropriate to the actual operations and status of foreign banking institutions. The intent of the bill is to ensure that foreign banking activities in the United States conform more closely to activities permissible for domestic banks without dismantling or disrupting existing operations more than necessary to meet the objective.

Id. at 8.

The Senate Report echoes a similar theme: "The general policy of the United States with regard to foreign enterprises doing business in the United States has been one of national treatment." *1978 Senate Report, supra*, at 2. "The committee thus believes national treatment is the most appropriate policy to adopt with respect to foreign banks in the United States . . . ." *Id.* at 9. We conclude from these passages that the IBA seeks to treat federally-chartered foreign and domestic banks as similarly as possible under the Act.

Thus, turning to section 4(a), we believe Congress sought to treat the establishment of a foreign bank's federally-chartered offices similarly to the establishment of the offices of its "domestic counterparts." In so doing, we must determine whether Congress intended the opening of the first office in a federally-chartered foreign bank's home state to parallel the opening of a federally-chartered domestic bank's principal office or the opening of a branch office of such a bank. The language of section 4(h) suggests that establishment of a foreign bank's initial home state office parallels the establishment of a domestic national bank's principal offices. That section provides in part:

> A foreign bank with a Federal branch or agency operating in any State may (1) with the prior approval of the Comptroller establish and operate ad-

> ditional branches or agencies in the State in which such branch or agency is located on the same terms and conditions and subject to the same limitations and restrictions as are applicable to the establishment of branches by a national bank if the principal office of such national bank were located at the same place as the initial branch or agency in such State of such foreign bank and (2) change the designation of its initial branch or agency to any other branch or agency subject to the same limitations and restrictions as are applicable to a change in the designation of the principal office of a national bank if such principal office were located at the same place as such initial branch or agency.

12 U.S.C. § 3102(h) (Supp. V 1981). Thus, for purposes of establishing additional offices in the home state, a foreign bank's initial home state is equated with a domestic national bank's principal office. This comports with the IBA's objective of national treatment by allowing foreign banks to open additional home state offices on the same terms as could federally-chartered domestic banks under the McFadden Act.[7] Second, for purposes of changing the designation of the initial office, a foreign bank's initial home state office is again equated with a domestic national bank's principal office.

The House report provides further evidence that establishment of the initial home state office is analogous to establishment of a national bank. "For purposes of the McFadden Act and Federal banking law in general," the report states, "the branches [established under section 4] would be treated as if they are national banks *or* branches thereof." *1978 House Report, supra*, at 12 (emphasis added). We believe that the most reasonable conclusion to draw from this language and the language of section

[7] We agree with the District Court that the principles of the McFadden Act are irrelevant to the establishment of a federally-chartered foreign bank's *initial* home state office.

4(h) is that establishment of a foreign bank's initial home state office is analogous to establishment of a domestic bank's principal office. Congress' intent to distinguish establishment of the initial office from the establishment of additional home state offices is evidenced in section 4(h). Moreover, the Committee's statement that for purposes of the McFadden Act a branch could be treated as "a national bank" *or* "branch thereof" would be redundant unless "national bank" and "branch thereof" differed conceptually.

Having decided that the establishment of a foreign bank's federally-chartered bank's *initial* home state office is analogous to the establishment of a domestic bank's federally-chartered principal office, we note that a state cannot prohibit establishment of a federally-chartered domestic bank's principal office. *See Pineland State Bank v. Proposed First National Bank of Bricktown*, 335 F. Supp. 1376, 1379 (D. N.J. 1971). *See generally* 12 U.S.C. §§ 26, 27 (Supp. V 1981). Section 4(a) of the IBA, however, grants a state some control over establishment of a federally-chartered *foreign* bank's initial office. By treating a foreign bank differently from a domestic bank, section 4(a) departs from the IBA's theme of national treatment. However, we believe that where, as here, a provision of the IBA is unclear, it should be construed to minimize any departure from the IBA's overriding objective of national treatment. National treatment would preclude any state regulation of a federally-chartered foreign bank's initial home state office. We find that the Comptroller's interpretation of section 4(a), approved by the District Court, permits as little state regulation of the establishment of such offices as is consistent with the terms of section 4(a). Accordingly, we affirm the Comptroller's interpretation of section 4(a).[8]

[8] Illinois Bankers Association, Independent Community Banks in Illinois, Mid-American Legal Foundation, and the Chicago Association of Commerce and Industry, as *amici curiae*, filed a

(Footnote continued on following page)

III

Turning now to the second issue in this appeal, we must address the extent to which the Comptroller must defer to state law in licensing a foreign bank's federal interstate office.[9] We also must consider whether the IBA requires a federal interstate office to comply with the limitations on bank operations imposed by the receiving state.

A

Section 4(a), 12 U.S.C. § 3102(a) (Supp. V 1981), provides the general framework for chartering any federal branch or agency.[10] That section, however, begins "[e]xcept as

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[8] *continued*
brief in support of the appellants. They argue that requiring the Comptroller to defer to state reciprocity requirements would not conflict with the IBA and that those requirements, therefore, should not be held to be preempted. For the reasons stated in text, we believe the IBA's theme of national treatment for foreign banks requires an interpretation of section 4(a) that grants the states as little control over the entry of federally-chartered foreign banks as is consistent with the statutory language and the legislative history. Thus, in our view, application of state reciprocity requirements to the establishment of the federally-chartered foreign bank's initial home state office would conflict with the IBA, and cannot be enforced. *Cf. Conference of State Bank Supervisors v. Conover*, No. 82-1303 (D.C. Cir. June 30, 1983) (affirming Comptroller's regulations preempting inconsistent state law restrictions on adjustable rate mortgages offered or purchased by national banks).

[9] In the context of this opinion, an "interstate office" is a branch or agency of a foreign bank located, or to be located, in a state other than the foreign bank's home state. *See supra* note 3 (definition of home state). And, the state in which the interstate office is located is termed the "receiving state."

[10] Section 1(b)(5), 12 U.S.C. § 3101(5) (Supp. V 1981), defines a federal agency as an agency of a foreign bank established and operating under section 4. Similarly, section 1(b)(6), *id.* § 3101(6), defines a federal branch as a branch of a foreign bank established and operating under section 4.

provided in section [5]," and section 5, *id.* § 3103, sets out additional requirements for establishing and operating a federal interstate branch or agency. Section 5(a) provides in part:

> (a) Except as provided by subsection (b) of this section,
>
> (1) no foreign bank may directly or indirectly establish and operate a Federal branch outside of its home State unless
>
> (A) its operation is expressly permitted by the State in which it is to be operated, and
>
> (B) the foreign bank shall enter an agreement or undertaking with the Board to receive only such deposits at the place of operation of such Federal branch as would be permissible for a corporation organized under section 25(a) of the Federal Reserve Act [12 U.S.C. 611 et seq.] under rules and regulations administered by the Board;
>
> (2) no foreign bank may directly or indirectly establish and operate a State branch outside of its home State unless
>
> (A) it is approved by the bank regulatory authority of the State in which such branch is to be operated, and
>
> (B) the foreign bank shall enter an agreement or undertaking with the Board to receive only such deposits at the place of operation of such State branch as would be permissible for a corporation organized under section 25(a) of the Federal Reserve Act under rules and regulations administered by the Board;

(3) no foreign bank may directly or indirectly establish and operate a Federal agency outside of its home State unless its operation is expressly permitted by the State in which it is to be operated;

(4) no foreign bank may directly or indirectly establish and operate a State agency or commercial lending company subsidiary outside of its home State, unless its establishment and operation is approved by the bank regulatory authority of the State in which it is to be operated . . . .

12 U.S.C. § 3103 (Supp. V 1981) (indentation added).

Pursuant to his authority under section 13, *id.* § 3108(a), the Comptroller adopted the following definitions and interpretation:

> A "Federal branch" is an office or place of business, licensed by the Comptroller and operated by a foreign bank in any State of the United States, which can engage in the business of banking, including the exercise of fiduciary powers and the acceptance of deposits from citizens and residents of the United States.

12 C.F.R. § 28.2(c) (1980).

> A "Limited Federal branch" is a Federal branch licensed by the Comptroller which, pursuant to an agreement between the parent foreign bank and the Federal Reserve Board, can receive only such deposits as would be permissible for an Edge Corporation organized under section 25(a) of the Federal Reserve Act (12 U.S.C. 611). Except for this restriction, a Limited Federal branch can exercise the full range of powers available to any Federal branch.[11]

[11] An Edge Act corporation can "receive only such deposits within the United States as may be incidental to or for the purpose of carrying out transactions in foreign countries or dependencies or insular possessions of the United States . . . ." 12 U.S.C. § 615(a) (Supp. V 1981). *See also* 12 C.F.R. § 211.4 (1983).

12 C.F.R. § 28.2(d) (1980). *See also infra* note 19 (text of 12 C.F.R. § 28.2(b) (1980), defining "Federal agency").

> Limited Federal branches can accept only such types of deposits as are permissible to Edge Corporations pursuant to 12 U.S.C. 615 and 12 C.F.R. Part 211. Apart from these exemptions or qualifications, Federal branches and agencies can engage in the same type of business and exercise the same powers as a national bank, subject to the conditions and requirements contained in the statutes and any implementing rules and regulations promulgated by the federal banking authorities.

12 C.F.R. § 28.101.3 (1980).

In his discussion of the public comments to these regulations, the Comptroller rejected the application of state reciprocity laws to the federal chartering of foreign bank branches and agencies. *See* 44 Fed. Reg. 65382 (1979).

Appellants contend that the Comptroller's interpretation of section 5, as reflected in the above quoted provisions, violates section 5 in two ways. First, the Comptroller's interpretation enables him to license a foreign bank's federal interstate office in a receiving state that does not expressly permit that particular foreign bank to establish a state-chartered interstate office. Second, even if the receiving state permitted a particular foreign bank to establish an interstate office, the Comptroller's interpretation does not require that the bank operations of the federal interstate office be "expressly permitted" by the receiving state. Brief of Appellants at 44-45. Appellants complain that the Comptroller has approved two applications by Australian banks to establish an interstate federal branch in Illinois in violation of Illinois' banking reciprocity law. Brief of Appellants at 52 n.76; J.A. 73-74 (Plaintiff's Amended Statement of Material Facts as to Which There Is No Genuine Issue). *See* Ill. Rev. Stat. ch. 17 § 2710 (1981). Appellants also complain that the Comptroller has approved an application by a British bank to

establish an interstate federal branch in Washington State without requiring that branch to comply with lending restrictions and other operational limitations imposed on a foreign bank's branches by Washington law. J.A. 13, 15 (Complaint); *id.* 72-73 (Plaintiff's Amended Statement of Material Facts as to Which There Is No Genuine Issue). *See* Wash. Rev. Code § 30.42.110 (repealed 1982); *see also* Wash. Rev. Code § 30.42.105 (Supp. 1982) (foreign bank branches: Power to make loans and to guarantee obligations); *id.* § 30.42.155 (foreign bank branches: Powers and activities).

The Comptroller contends that a state has essentially the same power to veto the entry of a federal interstate office under section 5(a) as it has to veto the entry of a federal home state office under section 4(a).[12] Thus, the Comptroller contends that he can license a foreign bank's interstate branch unless the receiving state permits *no* foreign bank to operate a state-chartered branch.[13] Similarly, he can license a foreign bank's interstate federal agency unless the receiving state permits *no* foreign bank to operate a state-chartered agency. Brief for Appellee at 19.

In support of his interpretation of the statute the Comptroller compares sections 5(a)(1)(A) and 5(a)(3) with sections 5(a)(2)(A) and 5(a)(4). Under sections 5(a)(1)(A) and 5(a)(3), no foreign bank can establish or operate a federal interstate office unless that office's operation is "express-

[12] In the Comptroller's view, section 5(a) expands the states' section 4(a) veto power only in so far as section 5(a) prohibits him from licensing an interstate branch or agency if the receiving state's law is silent as to whether foreign banks in general could establish a state chartered branch or agency. Letter from R. Craig Lawrence (Counsel for Appellee) to Clerk, United States Court of Appeals for the District of Columbia Circuit (June 4, 1982) (supplementing answers proffered at oral argument).

[13] A foreign bank seeking to establish an interstate branch must also comply with sections 5(a)(1)(B) or 5(a)(2)(B), neither of which are at issue here.

ly permitted" by the receiving state. Under sections 5(a)(2)(A) and 5(a)(4), on the other hand, no foreign bank can establish or operate a state-chartered interstate office unless that office is "approved" by the receiving state. The Comptroller contends that the approval required in sections 5(a)(2)(A) and 5(a)(4) requires the receiving state to approve *each* application. He concludes: "Thus, the structure of § 5(a) makes it clear that 'approval' (for state-chartered offices) means specific resolution of the *particular application* involved, whereas 'express permission' (for federally-chartered offices) means a general authorization for the *kind* of office (i.e., branch or agency) proposed." Memorandum in Support of Defendant's Motion for Summary Judgment at 13 (record document 4) (emphasis in original).

The Comptroller further contends that section 5(a) does not subject a federal interstate office to limitations on business operations that the receiving state's law imposes on a foreign bank's state-chartered interstate office. The Comptroller says that section 4(b), which provides in part that "operations of a foreign bank at a Federal branch or agency shall be conducted with the same rights and privileges as a national bank in the same location," sets out the operating limitations of every federal branch or agency.[14] He reasons that the word "operation" in sections 5(a)(1)(A) and 5(a)(3), therefore, refers to the fact of operation and not to the specific operational activities of an interstate office. If section 5(a) subjected a federal interstate office to state law restrictions on its operation, the Comptroller maintains, then that office would not have the powers of a national bank. Brief for Appellee at 40-42. Additionally, he asserts that appellants' interpretation would deny foreign banks "the options inherent in the

[14] Acknowledging that section 4(b) is applicable only "[e]xcept as otherwise specifically provided" in the IBA, the Comptroller states: "Had Congress intended for section 4(b) to be preempted by section 5(a), it could and would have said so much more clearly." Brief for Appellee at 39.

dual banking system," which options he describes as "[t]wo separate sets of regulatory and operating (as well as chartering) criteria." *Id.* at 36, 41. The Comptroller therefore maintains that section 5(a) is not an exception to section 4(b), and that section 4(c),[15] which makes no mention of state law requirements, provides the criteria for chartering home state and interstate federal offices. Lastly, the Comptroller contends that if federal interstate offices were subject to the same limitations as state-chartered offices of foreign banks, "[t]here would never be any reason for a foreign bank to apply for a federal license outside its home state." Brief for Appellee at 43.

Appellants maintain that section 5(a) prohibits a foreign bank from establishing or operating a federal interstate branch or agency unless both the establishment and business operations of that office are expressly permitted by the receiving state. Appellants direct our attention to Congress' use of the terms "its" and "it" throughout section 5(a), arguing that this language demonstrates that the Comptroller cannot license a foreign bank's federal interstate office unless "the creation and activities of *each* interstate federal branch or agency . . . [are] 'expressly permitted' by the relevant state." Brief of Appellants at 44. The use of "expressly permitted" in sections 5(a)(1)(A) and 5(a)(3) and "approved" in sections 5(a)(2)(A) and 5(a)(4) was necessary, appellants contend, because federal and state offices of foreign banks are chartered by different authorities. Under section 4(a), a foreign bank seeking a federal branch or agency must secure the Comptroller's approval. Likewise, a foreign bank seeking to establish

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[15] Section 4(c), 12 U.S.C. § 3102(c) (Supp. V 1981), provides:

> In acting on any application to establish a Federal branch or agency, the Comptroller shall take into account the effects of the proposal on competition in the domestic and foreign commerce of the United States, the financial and managerial resources and future prospects of the applicant foreign bank and the branch or agency, and the convenience and needs of the community to be served.

a state-chartered branch or agency must secure that state's approval. Appellants argue that since Congress had already stated in section 4(a) that a foreign bank seeking to establish a federal branch or agency had to secure the Comptroller's approval, there was no need to restate this in section 5(a). Section 5(a), however, permits the Comptroller to approve an application only if the business operations of that foreign bank's branch or agency are expressly permitted by the receiving state. Brief of Appellants at 45-46.

With respect to the operations of a foreign bank's interstate office, appellants note that section 4(b) states: "Except as otherwise specifically provided in this [Act]"; they contend that Congress provided "otherwise" in section 5(a). Appellants also point to the difference between section 4(a), which refers to the establishment of a foreign bank office, and section 5(a), which refers both to the establishment and the operation of a foreign bank office. They conclude that: "The terms 'operate' and 'operation' clearly show the intent of Congress to require express state permission for the business functions of interstate federal branches and agencies." Reply Brief of Appellants at 21. Appellants also contend that foreign banks would have a federal option as well as a state option under their interpretation of section 5(a) because appellants seek to impose on federal interstate offices only state laws that define "the permissible *business functions* of foreign bank branches and agencies," and *not* "state capital adequacy and other 'safety and soundness' requirements and state supervisory procedures." Reply Brief of Appellants at 26 (emphasis in original). Thus, appellants contend, the Comptroller can make the federal interstate license attractive to foreign banks by adopting liberal requirements in the area of discretionary supervisory standards.

In support of their construction of the statute, appellants turn to the legislative history. The Senate committee report stated:

> Under Section 5(a) foreign banks, as now, and as under the House-passed bill, would be able to establish branch or agency offices in any State where this is permissible. The decision to attract foreign bank entry is, as now, left to the individual States.

1978 Senate Report, supra, at 10.

> The section thus affirms in Federal law the right of States to attract foreign banks and foreign investment by allowing foreign bank branches and agencies to be established in any State where permissible. . . . [F]oreign bank branches and agencies would be able, with appropriate State approval where necessary, to make both domestic and international commercial [sic] loans at locations throughout the country.

Id. at 11.

> [Section 5] leaves each State free to decide whether and to what extent it wishes to permit foreign banks and limits only the single activity—deposit-taking—that produces competitive disparities in the national marketplace . . . .

Id. at 12.[16]

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[16] Appellants also note the comments by Congressmen Annunzio, Pepper, and Fascell during the House floor debate on the IBA. *See* 124 Cong. Rec. 9080-104 (1978). These comments indicated the Congressmen's approval of state limitations on interstate branches and agencies. However, the Congressmen were speaking in opposition to a committee amendment to section 5(a), later rejected by the House (*see id.* at 9100), that would have required a receiving state to permit the establishment of interstate branches by the state-chartered domestic banks of a particular home state if the receiving state permitted the establishment of interstate branches by the state-chartered foreign banks of that home state. *See id.* at 9090. In each instance the Congressmen's remarks were directed at interstate branching by *state*-chartered foreign and domestic banks. *See id.* at 9094, 9096. Thus, these comments have little significance in determining a state's power over the *federally*-chartered interstate offices of a foreign bank under the IBA's section 5(a).

(Footnote continued on following page)

The District Court upheld the Comptroller's regulations. it said:

> Notwithstanding plaintiffs' suggestion that the difference between the language in sections 5(a)(1) and (3) and that in section 5(a)(2) is only semantic, the Court cannot ignore as explicit a distinction as that which the draftsmen drew here. A federal branch or agency will not be allowed unless "its operation is expressly permitted by the State in which it is to be operated;" a State branch will not be permitted unless "it is approved by the bank regulatory au-

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[16] *continued*

Appellants also direct our attention to a question Senator Stevenson asked Robert H. Mundheim, the General Counsel to the Department of the Treasury, during Senate hearings on the IBA. Senator Stevenson asked:

> Well, you're getting a little ahead of me. I was going to ask you what the basis was for distinguishing between agencies and branches and, sharing your views about the desirability of parity between foreign and domestic institutions, ask if the Treasury would have objections to permitting agencies and branches to engage in such multi-state activities as the States are willing to permit, except that their deposit taking activities, outside of their home State, would be limited to those of Edge Act corporations.

International Banking Act of 1978: Hearings on H.R. 10899 before the Subcomm. on Financial Institutions of the Senate Comm. on Banking, Housing, and Urban Affairs, 95th Cong., 2d Sess. 72 (1978). Based on an excerpt of this question, appellants argue that Senator Stevenson's remarks "provide overwhelming evidence that the Comptroller may not approve either the establishment or the business operations of an interstate federal branch or agency unless they are expressly permitted by the state in which such office is to be located." Brief of Appellants at 51. We are not convinced that Senator Stevenson intended his words as a statement that section 5(a) empowered the receiving state to impose its operating limitations on foreign banks' federally-chartered interstate offices. Regardless of the proper characterization of Senator Stevenson's words, however, we find this part of the IBA's legislative history inconclusive in determining the section 5(a) issue.

> thority of the State in which such branch is to be operated." *See* Pub. L. No. 95-369 § 5(a), 92 Stat. 613. In light of the system for dual entry into the United States market, through either State chartering or the federal provisions of section 4(a) of the Act, the conclusion that Congress intended not to subject federal interstate offices to the particular requirements of State law is inescapable. As the 1978 Senate Report observed, section 5(a) "affirms in Federal law the right of the States to attract foreign banks and foreign investment by allowing foreign bank branches and agencies to be established in any State where permissible. . . . The section leaves each State free to decide whether and to what extent it wishes to permit foreign banks [. . .]." 1978 Senate Report at 10-12. The States were left free by section 5(a) to allow agencies, branches, both agencies and branches, or neither. And nothing in the Comptroller's regulations would deny them that power: States may veto any foreign bank entry into their territories and may limit operations to branch or agency activities. Section 5(a), and the Comptroller's regulations, only leave federal authorities free to grant charters in those States where the type of operation the foreign applicant seeks is not itself prohibited.

J.A. 104 (unbracketed ellipsis in original).

B

We agree with the District Court's conclusion on this issue. After closely reviewing the language and legislative history of section 5(a) in the light of appellants' arguments, we cannot say that there are "compelling indications" that the Comptroller's interpretation of section 5(a) is wrong.[17]

[17] We also reject appellants' argument grounded on similarities between the Douglas Amendment, *see supra*, pp. 17-18, and the IBA's section 5. We are not willing to reject the Comptroller's view of section 5 based solely on comparisons to an unrelated, though similarly worded statute when the Comptroller has chosen a course that is consistent with the language and legislative history of section 5(a).

See Red Lion Broadcasting Co. v. FCC, 395 U.S. 367, 381 (1969). Thus, we are obliged to defer to the Comptroller's interpretation of the IBA because "the interpretation of an agency charged with the administration of a statute is entitled to substantial deference." *Blum v. Bacon*, 457 U.S. 132, 141 (1982). *See also FEC v. Democratic Senatorial Campaign Committee*, 454 U.S. 27, 37 (1981); *Udall v. Tallman*, 380 U.S. 1, 16 (1965).

Section 5(a) provides in relevant part that "*no* foreign bank may . . . establish and operate a Federal branch [or agency] outside of its home State unless (A) its operation is expressly permitted by the State in which it is to be operated . . . ." 12 U.S.C. § 3103(a)(1), (3) (Supp. V 1981). The dispute in interpreting this section focuses on the words "its operation." The appellants conclude that "its operation" refers to the operation of a particular federal interstate office. Thus, in appellants' view, section 5(a) would prohibit the Comptroller from licensing a federal interstate office if, due to limitations on banking operations or due to banking reciprocity requirements, the receiving state did not expressly permit the "operation" of that federal interstate office. On the other hand, the Comptroller concludes that "its operation" refers only to the interstate office's operation as a branch or as an agency. The Comptroller says that section 5(a) prohibits him from licensing an interstate branch (or agency) unless the receiving state expressly permits foreign banks to operate branches (or agencies). We believe that the language of section 5(a) reasonably supports either party's interpretation of the words "its operation." In addition, unlike the District Court, we do not believe that the precise difference between "expressly permitted" in sections 5(a)(1)(A) and 5(a)(3) and "approved" in sections 5(a)(2)(A) and 5(a)(4) is evident in the language of the statute.

Faced with two arguably reasonable interpretations of one statutory provision, we turn to the legislative history for guidance. Unfortunately, the relevant legislative history does not favor one interpretation over the other. The Senate Report says a foreign bank could "establish branch

or agency offices in any State *where this is permissible*," and "foreign bank branches and agencies would be able, *with appropriate State approval* where necessary, to make both domestic and international commercial [sic] loans at locations throughout the country," and that section 5 allows states "to decide whether *and to what extent* it wishes to permit foreign banks." *1978 Senate Report, supra*, at 10-12 (emphasis added). These general statements are consistent with the interpretation of either party in this appeal.

In short, we do not discern from the language or legislative history of section 5(a) any basis for saying that the Comptroller's interpretation is contrary to law.[18] In so doing, we bear in mind that our task is not to interpret the statute as we think best but rather to determine whether the Comptroller's interpretation was " 'sufficiently reasonable' to be accepted by a reviewing court." *FEC v. Democratic Senatorial Campaign Committee*, 454 U.S. 27, 39 (1981). "To satisfy this standard it is not necessary for a court to find that the agency's construction was the only reasonable one or even the reading the court would have reached if the question initially had arisen in a judicial proceeding." *Id. See also Udall v. Tallman*, 380 U.S. 1, 16 (1965). We hold, therefore, that the Comptroller can license a foreign bank's federal interstate branch in a receiving state if that state permits foreign banks to establish state-chartered interstate branches. Likewise, he can license a foreign bank's federal interstate agency in a receiving state if that state permits foreign banks to establish state-chartered interstate agencies. We also agree with the Comptroller that section 5(a) does not require federal interstate offices to comply with limitations on bank operations imposed by the receiving state.

[18] It would be inappropriate to resolve this dispute over section 5(a) by reference to the IBA's general theme of national treatment because the Comptroller cannot license interstate branches for domestic national banks and, therefore, section 5(a)'s authorization of federal interstate offices for foreign banks has no domestic counterpart.

IV

We now turn to the question whether a federal agency of a foreign bank can accept deposits from a person who is neither a citizen nor a resident of the United States. The Comptroller promulgated a regulation which stated that a federal agency could not accept deposits from citizens or residents of the United States. *See* 12 C.F.R. § 28.2(b) (1980).[19] However, in responding to public comments on this regulation, the Comptroller stated that "foreign-source deposits may be accepted by Federal agencies." 44 Fed. Reg. 65382 (1979). Appellants challenge this interpretation of the IBA.

A

Under the IBA, an "agency" is defined in section 1(b)(1) as:

> any office or any place of business of a foreign bank located in any State of the United States at which credit balances are maintained incidental to or arising out of the exercise of banking powers, checks are paid, or money is lent but at which deposits may not be accepted from citizens or residents of the United States . . . .[20]

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[19] 12 C.F.R. § 28.2(b) (1980) provides:

> A "Federal agency" is an office or place of business, licensed by the Comptroller and operated by a foreign bank in any State of the United States, which can engage in the business of banking but cannot exercise fiduciary powers or accept deposits from citizens or residents of the United States. A Federal agency may, however, maintain credit balances.

[20] 12 C.F.R. § 28-2(a) (1980) provides:

> "Credit balances", as distinct from deposits, consist of funds received at a Federal agency incidental to or arising out of the exercise of banking powers that are not intended to be deposits and that do not remain in the receiving institution after the transaction(s) to which they relate is completed.

This definition is not in dispute in this case.

12 U.S.C. § 3101(1) (Supp. V 1981). Section 1(b)(5), however, defines "Federal agency" as "an agency of a foreign bank established and operating under section [4] of this [Act]", *id.* § 3101(5), and section 4(d)[21] states that "[n]otwithstanding any other provision of this section, a foreign bank shall not receive deposits . . . at any Federal agency." *Id.* § 3102(d).

Appellants contend that regulation 28.2(b) violates section 4(d) of the IBA because, as indicated by the Comptroller's response to the applicable public comments, regulation 28.2(b) allows a federal agency to accept deposits. They argue that section 1(b)(1) is only a general definition of "agency" and that section 1(b)(5) subjects a *federal* agency to the additional limitations of section 4(d). Brief of Appellants at 59-60.

The Comptroller says that the validity of regulation 28.2(b) must be decided in the light of all the IBA provisions that are relevant to federal agency depository powers; section 4(d), he says, should not be considered in isolation. Following this approach, the Comptroller asserts that the "key distinction" between "branches" in section 1(b)(3)[22] and "agencies" in section 1(b)(1) is that branches can accept any deposits and agencies cannot accept deposits from United States citizens or residents. In the Comptroller's view, this distinction applies throughout the IBA and should be effected in interpreting sec-

[21] Section 4(d), 12 U.S.C. § 3102(d) (Supp. V 1981), provides:

> Notwithstanding any other provision of this section, a foreign bank shall not receive deposits or exercise fiduciary powers at any Federal agency. A foreign bank may, however, maintain at a Federal agency for the account of others credit balances incidental to, or arising out of, the exercise of is lawful powers.

[22] Section 1(b)(3), 12 U.S.C. § 3101(3) (Supp. V 1981), provides:

> "branch" means any office or any place of business of a foreign bank located in any State of the United States at which deposits are received . . . .

tion 4(d). Brief for Appellee at 47-48. *See* 44 Fed. Reg. 65382 (1979). The Comptroller next observes that section 4(b), 12 U.S.C. § 3102(b) (Supp. V 1981), grants to a foreign bank's federal branches and agencies the same rights and privileges as a national bank doing business at the same location. In the Comptroller's view, Congress included the section 4(d) limitation on a federal agency's deposit taking power to make clear that section 4(d) did not empower federal agencies to receive domestic deposits. In particular, he notes that section 4(d) begins "Notwithstanding any other provision of this section . . . ." (*i.e.*, section 4 and not the entire Act), and concludes from this language that section 4(d) was not intended to limit section 1(b)(1). Brief for Appellee at 48-49. Thus, the Comptroller would have us read section 4(d)'s prohibition against federal agencies accepting "deposits" as a prohibition against federal agencies accepting "domestic-source deposits." Finally, the Comptroller emphasizes that as the official charged with administration of the federal branch and agency provisions of the IBA, his interpretation of the IBA is entitled to great deference by the courts.

The Comptroller contends that the legislative history of the IBA supports his interpretation of sections 1 and 4. He first points to a May 29, 1975 press release from Congressman Rees, who introduced H.R. 12103, *supra*. That bill was the first foreign banking bill to define "agency." Congressman Rees stated that the "key difference between foreign [bank] branches and agencies currently is that branches can accept deposits from U.S. residents while agencies cannot." Brief for Appellee at 50. H.R. 12103 died in committee. The Comptroller next points to H.R. 13876, *supra*, sections 1(b)(1) and 4(d) of which were nearly identical to the like numbered sections of the IBA. In commenting on H.R. 13876, Congressman St. Germain noted, "The present legislation will allow foreign banks to establish agencies in more than one State since agencies cannot accept domestic deposits." 122 Cong. Rec. 24403 (1976). H.R. 13876 passed the House, but died in committee in the Senate. The Comptroller acknowledges

that the Senate Report accompanying H.R. 10899, which became the IBA, stated simply that "agencies cannot accept deposits." *1978 Senate Report*, *supra*, at 3. But he argues that Congress, in considering H.R. 10899, was greatly concerned with the extent to which a foreign bank's interstate branches could accept domestic deposits under section 5. The Comptroller asserts that due to this emphasis on domestic deposits, "[e]ventually, the Congress came to view the acceptance by agencies of non-U.S. deposits as synonymous with the acceptance of no deposits for purposes of the Act." Brief for Appellee at 51. The Comptroller concludes from this legislative history that Congress intended one crucial difference between branches and agencies—a branch, unlike an agency, can accept domestic deposits. The Comptroller also argues that the policies and objectives of the IBA support his conclusion. He says that denying federal agencies the power to accept foreign source deposits would diminish the intended parity of treatment between foreign and domestic banks, would eliminate a benefit intended to offset the detriment to foreign banks of other IBA provisions, and would curtail the influx of foreign funds into this country.

Appellants respond that H.R. 12103 would not have empowered the Comptroller to license a federal agency of a foreign bank. Thus, Congressman Rees' press release and H.R. 12103 itself referred solely to state-chartered agencies, and Congressman Rees' view of the differences between state-chartered branches and agencies under H.R. 12103 sheds no light on the differences between federally-chartered branches and agencies under the IBA. Reply Brief of Appellants at 31. Appellants note that H.R. 13876, the first bill introduced that would have permitted the Comptroller to charter federal foreign bank agencies, provided, in its section 4(d), that "a foreign bank shall not engage in the business of receiving deposits . . . at any Federal agency." Thus, appellants argue, as soon as Congress empowered the Comptroller to license federal agencies, it prohibited federal agencies from accepting any deposits, and Congress intended the same prohibition in

section 4(d) of the IBA. To support their view of H.R. 13876, they point to the committee report accompanying that bill and submit that the report indicates that a federal agency could not accept any deposits under that bill. The report, also cited by the Comptroller, stated:

> The home state of a foreign bank is defined as the state in which it accepts deposits. If it does not accept deposits, that is, if it has no branches or banking subsidiary and its activities are limited to operations permissible for agencies and commercial lending companies, then it may choose its home state from among those in which it conducts such operations. The intent is to restrict the acceptance of deposits to one state.

H.R. Rep. No. 1193, *supra*, at 4. The appellants say that we should not accord any importance to Congressman St. Germain's statement during the debate on H.R. 13876, because during the debate on the IBA, Congressman St. Germain stated without qualification that an agency could not accept deposits. 124 Cong. Rec. 9097 & 9098 (1978).

The District Court upheld the Comptroller's regulation. It found:

> Given the ambiguity of the statute and the confused and scant legislative history, the Comptroller's view of section 4(d) seems not unreasonable. Section 4(b), it should be noted, flatly granted federal agencies and branches of foreign banks "the same rights and privileges as a national bank" in the home State, with some exceptions. It is clear that the Act's sponsors did not intend to permit acceptance of domestic deposits by federal agencies as well as by federal branches. It may well be that the only function of the controverted language of section 4(d) was thus to withdraw whatever authority the Comptroller might appear to have gained under section 4(b) to authorize acceptance of domestic deposits at federal agencies. Such a view is supported by the first words of section 4(d), which establish that section 4(d) has

effect "[n]otwithstanding any other provision of this section [*i.e.*, section 4]." If plaintiffs were correct in their view, then careful drafting of section 4(d) would have extended the "notwithstanding" preface in section 4 (d) not just to section 4 itself but to the whole Act, to avoid the confusion created if the definition in section 1(b)(1) were read with section 4(d). The Court therefore concludes that the Comptroller properly read sections 1(b)(1) and 4(d) together when he promulgated regulations that permit federal agencies to accept foreign-source deposits. 12 C.F.R. § 28.2(b) (1981) . . . .

Moreover, absent "compelling indications" that the Comptroller's interpretation is wrong, the Court is obliged not to overturn it. . . . And the Court cannot say, based upon the terms of sections 1(b)(1), 1(b)(5) and 4(d), and the legislative history, that the statute specifically precludes the Comptroller's interpretation or that there is no basis in the legislative history for what he has done.

J.A. 107-08 (citations omitted).

B

We believe the District Court deferred to the Comptroller when no deference was due.[23] The language of sec-

[23] In *Volkswagenwerk Aktiengesellschaft v. FMC*, 390 U.S. 261 (1968), the Supreme Court stated:

> The construction put on a statute by the agency charged with administering it is entitled to deference by the courts, and ordinarily that construction will be affirmed if it has a "reasonable basis in law." But the courts are the final authorities on issues of statutory construction and "are not obliged to stand aside and rubber-stamp their affirmance of administrative decisions that they deem inconsistent with a statutory mandate or that frustrate the congressional policy underlying a statute." *NLRB v. Brown*, 380 U.S. 278, 291 [(1965)].

Id. at 272 (citations omitted).

tion 4(d) is not ambiguous. In section 1(b)(1) Congress provided that no agency of a foreign bank, whether operating under a federal or state charter, could accept deposits from citizens or residents of the United States. Section 1(b)(5), however, requires a federal agency be established under section 4, and in section 4(d), Congress prohibited federal agencies from accepting any deposits. The legislative history supports this plain meaning interpretation of the statute. For example, the Housing Report accompanying the IBA stated, in commenting on section 4: "Agencies . . . could perform all the functions of branches except for the receipt of deposits and the exercise of fiduciary powers." *1978 House Report, supra*, at 12. The Senate Report states flatly, "Federal agencies cannot accept deposits . . . ." *1978 Senate Report, supra*, at 7. *See also id.* at 10. This clear statutory mandate cannot be overcome by generalized policy arguments or scattered citations to the legislative history of unenacted bills. We therefore reject the Comptroller's interpretation of sections 1 and 4.

Despite the Comptroller's assertion to the contrary, section 4(d)'s prohibition against federal agencies' accepting deposits was *not* necessary in order to prevent a possible inference that section 4(b) granted federal agencies the power to accept deposits on the same terms as national banks. By its own terms, Section 4(b) only applies "[e]xcept as otherwise specifically provided" in the IBA. If section 1(b)(1) controls agency deposit-taking powers, as the Comptroller maintains, the quoted proviso in section 4(b) would invoke section 1(b)(1) and would prevent section 4(b) from granting federal agencies deposit-taking powers equal to those of national banks. Thus, adoption of the Comptroller's interpretation would render section 4(d)'s prohibition against federal agencies' accepting deposits mere surplus language in the statute. But in construing a statute, we "are obliged to give effect, if possible, to every word Congress used." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339, 99 S.Ct. 2326, 2331, 60 L.Ed.2d 931 (1979). *See also Symons v. Chrysler Corp. Loan Guarantee*

Board, 216 U.S.App.D.C. 80, 83-84, 670 F.2d 238, 241-42 (1981). By following the plain meaning of sections 1 and 4 we fulfill our obligation to give effect to each relevant provision of the IBA.

Thus, we reverse the District Court's approval of regulation 28.2(b), and conclude that the plain language of sections 1 and 4(d) prohibits a foreign bank's federally-chartered agency from receiving deposits from any source.

V

We affirm the District Court as to the Comptroller's interpretations of sections 4(a) and 5(a) of the IBA. However, the District Court erred in approving the Comptroller's interpretation of sections 1 and 4(d) and, to that extent, we reverse.

So ordered.

APPENDIX B

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CONFERENCE OF STATE BANK SUPERVISORS, *et al.*,
Plaintiffs,

v.

JOHN G. HEIMANN, COMPTROLLER OF THE CURRENCY,
Defendant.

Civil Action No. 80-3284

MEMORANDUM

Plaintiffs, who are State officials responsible for regulation of State-licensed banking institutions, brought this action for declaratory and injunctive relief to challenge regulations and an accompanying interpretive statement adopted by the Comptroller of the Currency under the International Banking Act of 1978, Pub. L. No. 95-369, 92 Stat. 607 ("the Act").[1] The action presents several novel questions concerning the Act's provisions for federal

[1] Plaintiffs complain not only of the Comptroller's regulations and interpretive statement but also of specific actions he has taken to approve applications by several foreign banks to operate under federal charter in various States. *See* Plaintiffs' Statement of Material Facts As To Which There Is No Genuine Issue (filed May 22, 1981) at 1-3 and Exhibits.

licensing of foreign banking operations in the United States. The matter is now before the Court on cross-motions for summary judgment.

Prior to passage of the Act, all foreign banks operating branches or agencies in the United States did so under State authority. The sections of the Act that are the subject of this action were intended to give foreign banks prepared to comply with various provisions of the Act the option of establishing offices in the United States under federal charter. The so-called "federal" branches and agencies of foreign banks would be governed by a "comprehensive regulatory and supervisory framework" administered by the Comptroller, who was to promulgate regulations based upon the Act. S. Rep. No. 1073, 95th Cong., 2d Sess. (1978) [hereinafter cited as "1978 Senate Report"] 7. In general, the federally-chartered offices of foreign banks are to enjoy the same privileges and meet the same obligations as national banks operating in a given State. As Section 4(b) of the Act provides:

> Except as otherwise specifically provided in this Act or in rules, regulations, or orders adopted by the Comptroller under this section, operations of a foreign bank at a Federal branch or agency shall be conducted with the same rights and privileges as a national bank at the same location and shall be subject to all the same duties, restrictions, penalties, liabilities, conditions, and limitations that would apply under the National Bank Act to a national bank doing business at the same location. . . .

Pub. L. No. 95-369 § 4(b), 92 Stat. 610. The Act also brought under federal control the operation of offices by foreign banks in more than one State, by requiring any foreign bank with offices in the United States to select a "home State" and then conform its deposit-taking activities in other States to those allowed corporations organized under Section 25(a) of the Federal Reserve Act, 12 U.S.C. §§ 611 *et seq.*, so-called "Edge Act" corporations. "Edge Act" corporations are strictly limited in their

ability to accept deposits in the United States. *See* 12 U.S.C. § 615; 12 C.F.R. § 211.4 (1981). The Comptroller issued the final regulations and interpretive statement challenged by plaintiffs on November 13, 1979. *See* 12 C.F.R. § 28 (1981); 44 Fed. Reg. 65,381-87 (1979).

Plaintiffs' attack on the Comptroller's regulations has several components. First, plaintiffs assert that the Comptroller erred in claiming authority to the charter foreign banking offices without regard to the specific regulations that States impose on foreign banks when they allow them to do business in their jurisdictions under State charters. Plaintiffs also argue that the Comptroller's regulations ignore a requirement in the Act that State agencies approve the interstate expansion of federally-chartered branches and agencies. Finally, plaintiffs assert that the Comptroller has no authority to permit the new federal "agencies," as opposed to federal "branches," to accept deposits from overseas customers, and that his regulations authorizing such activity are invalid.

Defendant denies that he has exceeded his authority under the Act, and claims that his interpretation of arguably ambiguous language in the Act is, in any case, entitled to substantial deference by the Court. For the reasons stated below, the Court will grant defendant's motion for summary judgment, and deny plaintiffs' cross-motion.

I.

Sections 4 and 5 of the Act lie at the heart of the dispute about the applicability of State regulations to federally-chartered foreign bank offices under the Comptroller's supervision. Section 4(a) governs the first entry of a foreign bank into the United States market under federal authority. It provides that "a foreign bank may, with the approval of the Comptroller, establish one or more Federal branches or agencies in any State in which . . . the establishment of a branch or agency, as the case may be, by a foreign bank is not prohibited by State law."

See Pub. L. No. 95-369 § 4(a), 92 Stat. 610. Section 4(b) provides that "[e]xcept as otherwise specifically provided in this Act" or regulations of the Comptroller pursuant to it, "operations of a foreign bank at a Federal branch or agency shall be conducted with the same rights and privileges as a national bank at the same location," with certain exceptions. Pub. L. No. 95-369 § 4(b), 92 Stat. 610. In the challenged regulations and interpretive statement, the Comptroller has taken the position that sections 4(a) and 4(b) provide that, unless a State would not permit the establishment of *any* foreign banking office in its territory, he can grant a federal charter for operation in a State to a foreign bank meeting his own criteria for chartering. Whether the particular bank seeking a federal charter for operations in the State could itself qualify for a State charter is, in the Comptroller's view, irrelevant under section 4(a): the Act's requirement that establishment of a foreign bank be "not prohibited" is simply intended to permit States that themselves refuse to charter any foreign bank also to exclude federally-chartered offices from their territory. Thus, the Comptroller's regulations contemplate that a State's prerogative is limited to admitting or excluding federally-chartered foreign bank branches or agencies; unless the given State exercises its veto power by refusing to charter foreign banks under any circumstance, a foreign bank may operate in that State by agreeing to conform to federal regulations similar to those applicable to national banks operating in the State.

Plaintiffs argue that the statutory requirement that "establishment of a branch or agency" be "not prohibited by State law" means that the Comptroller must require each applicant to comply with the regulations and conditions the prospective home State would impose if the applicant sought a State charter. In particular, plaintiffs assert, a federal applicant could not be licensed in a given State if the government of its home nation had not complied with whatever reciprocity requirement the State banking authority enforces in granting State charters to a foreign bank from the same nation. Those reciprocity

requirements, intended to ensure that American banks from particular States receive opportunities for overseas banking equal to privileges granted foreign banks in the same States, are, according to plaintiffs, important in their state regulatory schemes. *See, e.g.*, N.Y. Banking Law § 202-a(2) (McKinney Interim Anno. Serv., June 1981); Ill. Rev. Stat. ch. 16½ ¶ 503 (State Bar Ass'n Ed. 1975). And, although the applicability of those State reciprocity requirements to foreign bank entry under federal authority is the most hotly contested question concerning the Act's provisions in section 4, plaintiffs indicate that the Comptroller's regulations would also ignore other requirements of State law. On that basis, they seek a declaration that the regulations violate the Act.

The terms of section 4 and the larger design of the Act, however, support the Comptroller's view of his authority, and there is nothing in the legislative history of the Act that would forbid his interpretation. Section 4(a) simply authorizes federal chartering in a State where establishment of a foreign banking office is not prohibited by State law. Only by taking section 4(a) out of its context is it arguable that the contested proviso subjects federally-chartered offices to all the regulations imposed on State-chartered institutions. A principal purpose of the 1978 Act was to give foreign banks "an important new option" in doing business in the United States; Congress understood that the federal chartering option might give overseas banks "opportunities which they do not now possess," even though it would also place new burdens of federal regulation on them. *See* Remarks of Mr. St. Germain, 122 Cong. Rec. 24403 (July 29, 1976). Plaintiffs' view of the Comptroller's authority would in effect nullify the federal option. A foreign bank, under plaintiffs' interpretation, would have a choice between compliance with State regulations under a State charter, and compliance with State *and* federal rules under a federal charter. Without deciding whether defendant is correct in asserting that creation of a regime of "competitive regulation" was one purpose of the Act, *see* Memorandum In Support Of

Defendant's Motion For Summary Judgment at 16-19, it is improbable that Congress conceived of its "federal option" in plaintiffs' terms. *See* 1978 Senate Report at 6. Moreover, plaintiffs' argument does not adequately explain the provision in 4(b) that establishes for federally-chartered foreign banks the powers and operational authority in their home State possessed by "a national bank at the same location," with certain exceptions. Because Congress intended to accord national treatment to foreign banks that sought the benefits and burdens of federal control, it was proper for the Comptroller to deem the proviso of section 4(a) only to allow States to permit or to veto federally-chartered offices, and not to condition their entry. As the 1978 Senate Report observed, section 4 "insures that in States where foreign banks are welcome, they will have a State-Federal option." *Id.* Section 4 thus extended the federal option to those States, in the Report's words, "where foreign banks are welcome," not where particular banks, or where banks from particular countries, are welcome.

Revisions in the text of the Act prior to final passage in 1978, said by both parties to support their own views of section 4(a), are treacherous guides for interpretation of the Act. The fact that Congress rejected a 1975 version of the Act, S. 958, that would have wholly denied the States the veto power that section 4(a) grants them does not, in itself, demonstrate that section 4(a) granted the States something other than the veto power the Comptroller concedes. Similarly, the opposition of federal banking authorities to any provision that would make state reciprocity requirements a part of the new international banking law, voiced at hearings on H.R. 7325 in 1977, cannot provide proof that they assumed that section 4(a) would have such a feature. *See International Banking Act of 1977: Hearings on H.R. 7325 Before the Subcomm. on Financial Institutions Supervision, Regulation, and Insurance of the House Comm. on Banking, Housing, and Urban Affairs*, 95th Cong., 1st Sess. (1977) 39-41 (remarks of Federal Reserve Board Governor Gard-

ner). Defendant, on the other hand, attempts to rely upon the rejection of the so-called "Grassley amendment" in 1978, which would have authorized federal officials to consider treatment of American financial institutions in the home country of a foreign bank in deciding whether to charter that bank in the United States. It is arguable, as defendant suggests, that Rep. Grassley would not have proposed such a program for federal enforcement of national reciprocity if he thought State reciprocity was already a part of the Act. But, as an expression of the intent of Congress as a whole, the final terms of section 4 and the broad design of the Act appearing elsewhere in the legislative history provide a more substantial basis for the Comptroller's rejection of plaintiffs' argument.

Plaintiffs compare the provisions of section 4(a) to the McFadden Act of 1927, as amended, 12 U.S.C. § 36(c), which limits the ability of national banks to operate intrastate branches. The McFadden Act was held in *First Nat'l Bank of Logan v. Walker Bank & Trust Co.*, 385 U.S. 252, 261 (1966), to deny the Comptroller power to authorize intrastate branching by a national bank if the proposed branching technique was not specifically allowed to State banks by State law. According to plaintiffs, section 4(a) of the Act, like the McFadden Act as it was authoritatively construed in *Walker Bank*, substantially incorporates State-law standards for determining whether the Comptroller may authorize particular banking operations by foreign banks entering the United States. The rule in *Walker Bank*, in plaintiffs' view, established that the McFadden Act did not allow the Comptroller to authorize national-bank branching by any means simply because a State authorized State-bank branching through one means. By analogy, plaintiffs argue, section 4(a) of the Act should be read to grant to the States more than a simple veto power over foreign bank entry: the Comptroller cannot, according to plaintiffs, authorize *any* foreign bank to enter a State simply because that State would itself authorize *some* foreign bank to do so.

It would be pointless to question plaintiffs' reading of the McFadden Act and the *Walker Bank* decision. Their argument based upon the McFadden Act and *Walker Bank* avails them nothing here because their analogy to section 4(a) cannot be maintained, either as a means of discovering Congressional intent in section 4(a), or as an applicable model for judicial construction of the banking laws. The McFadden Act itself is irrelevant to the Congressional design in section 4(a), which only governs entry of foreign banks into the United States market under federal charter; in furtherance of its policy favoring parity for foreign and domestic banks holding federal charters, Congress elsewhere expressly adopted McFadden Act principles by providing in section 4(h) of the 1978 Act that intrastate branching by federally-chartered foreign banks should occur under the same rules as those applicable to domestic national banks. Congress thus appears to have well understood the reach of the McFadden Act, and to have chosen in the 1978 Act to limit the McFadden Act's force to intrastate branching. This Court will not attribute to Congress any broader effort to incorporate the spirit of the McFadden Act, or the plaintiffs' version of the rule in *Walker Bank*, than that supported by the terms of section 4(h) and the legislative history of section 4. The *Walker Bank* decision itself, carefully limited as it was to the specific problem of statutory construction existing under 12 U.S.C. § 36(c), involved language and interpretive difficulties not present in the wholly different, and relatively simple, language of section 4(a). *Compare* Pub. L. No. 95-369 §§ 4(a), 5(a), 92 Stat. 610, 612-13 *and* 12 U.S.C. § 36(c)(2). The assumed parallelism between the McFadden Act and section 4(a) simply does not exist.

II.

Section 5(a) of the Act, in establishing the conditions under which foreign banks operating in the United States may maintain offices outside their home States, regulates the interstate expansion of most State-chartered branches

and federally-chartered branches and agencies. Section 5(a)(1) provides that a foreign bank may establish an interstate federal branch only if "its operation is expressly permitted by the State in which it is to be operated." Pub. L. No. 95-369 § 5(a)(1), 92 Stat. 613. Section 5(a)(3) places the same limitation on establishment of an interstate federal agency. Section 5(a)(2), employing different language, declares *inter alia* that a foreign bank may establish an interstate State branch only if "it is approved by the Bank regulatory authority in which such branch is to be operated." Pub. L. No. 95-369 § 5(a)(2), 92 Stat. 613. Plaintiffs assert that the Comptroller's actions here violated the Act by disregarding the specific State-law limitations on the interstate entry and operation of foreign offices in the States in which the offices are to be opened. In essence, plaintiffs argue that the Act makes no material distinction between the interstate licensing requirements for State and for federal offices. Defendant's position is that sections 5(a)(1) and 5(a)(3) simply preserve the veto power given the States in section 4(a), and thus make it possible for a State to exclude interstate offices only if it totally bars foreign banking offices from its territory. In the Comptroller's view, reciprocity rules and other State regulations that might prevent a particular bank from obtaining State approval of an interstate office are thus as irrelevant to the federal interstate licensing process as the State regulations are, in his opinion, to the home-State entry process under section 4(a).

The Comptroller has correctly interpreted the provisions of section 5(a). Notwithstanding plaintiffs' suggestion that the difference between the language in sections 5(a)(1) and (3) and that in section 5(a)(2) is only semantic, the Court cannot ignore as explicit a distinction as that which the draftsmen drew here. A federal branch or agency will not be allowed unless "its operation is expressly permitted by the State in which it is to be operated;" a State branch will not be permitted unless "it is approved by the bank regulatory authority of the State in which such branch is to be operated." *See* Pub. L. No. 95-369 § 5(a), 92 Stat.

613. In light of the system for dual entry into the United States market, through either State chartering or the federal provisions of section 4(a) of the Act, the conclusion that Congress intended not to subject federal interstate offices to the particular requirements of State law is inescapable. As the 1978 Senate Report observed, section 5(a) "affirms in Federal law the right of the States to attract foreign banks and foreign investment by allowing foreign bank branches and agencies to be established in any State where permissible. . . . The section leaves each State free to decide whether and to what extent it wishes to permit foreign banks." 1978 Senate Report at 10-12. The States were left free by section 5(a) to allow agencies, branches, both agencies and branches, or neither. And nothing in the Comptroller's regulations would deny them that power: States may veto any foreign bank entry into their territories and may limit operations to branch or agency activities. Section 5(a), and the Comptroller's regulations, only leave federal authorities free to grant charters in those States where the type of operation the foreign applicant seeks is not itself prohibited.

The historic context of section 5(a) in the Ninety-Fourth and Ninety-Fifth Congresses confirms the Comptroller's view. Congress had been concerned by the ability of foreign banks operating under State authority to gather local deposits at branch locations in two or more States. Such a capacity gave foreign banks a competitive advantage over many domestic institutions. *See* 1978 Senate Report at 8-10. Accordingly, early versions of section 5(a) effectively prevented establishment of any interstate branches by foreign banks under federal or State charter. *See, e.g.*, H.R. 13876 § 5(a), *reprinted in the International Banking Act of 1976: Hearings on H.R. 13876 Before the Subcomm. on Financial Institutions of the Senate Comm. on Banking, Housing, and Urban Affairs*, 94th Cong., 2d Sess. 101-02 (1976). On the other hand, Congress was reluctant to foreclose the ability of States currently lacking major banking centers to attract foreign banks into their local markets. *See* 1978 Senate Report at 7-10. The final form

of section 5(a) reflected a compromise achieved on the House floor on April 6, 1978, when the prohibitory language of the earlier bills was deleted and a version that gave the States the kind of veto power they enjoy under section 4(a) was put in its place. *See* H.R. 10899 at § 5(a), *reprinted in International Banking Act of 1978: Hearings on H.R. 10899 Before the Subcomm. on Financial Institutions, Supervision, Regulation and Insurance of the House Comm. on Banking, Housing, and Urban Affairs*, 95th Cong., 2d Sess. 315 (1978). During the April 6 House floor debate, members appear to have been chiefly concerned with the questions of whether Congress should prohibit, or allow, the States to license branch offices of foreign banks that had home States elsewhere, and whether the new federal chartering and licensing system should provide such an option. The version of section 5(a) adopted in the House and later approved in the Senate allowed interstate branching, but restricted the State and federal interstate offices to acceptance of so-called "Edge Act" deposits. It is significant, in light of plaintiffs' arguments here, that there is no substantial evidence within the important House debate on April 6 that members believed section 5(a) would have the effect of incorporating into the Act State regulations for interstate federal offices of foreign banks. *See* 124 Cong. Rec. 9080-9104 (Apr. 6, 1978).

III.

The Comptroller claims authority under the Act to authorize establishment of foreign bank agencies that would accept deposits from persons who are not citizens or residents of the United States. *See* 12 C.F.R. § 28.2(b) (1978). Such has been his position at least since the time when the proposed rule was published. *See* 44 Fed. Reg. 27,431 (May 10, 1979). Plaintiffs assert that the Comptroller's regulations thus violate section 4(d) of the Act, which provides:

> Notwithstanding any other provision of this section, a foreign bank shall not receive deposits or exercise fiduciary powers at any Federal agency. A foreign bank may, however, maintain at a Federal agency for the account of others credit balances incidental to, or arising out of, the exercise of its lawful powers.

Pub. L. No. 95-369 § 4(d), 92 Stat. 611. The Comptroller insists, however, that the definition of "agency" in section 1 of the Act supports his rule. Section 1 provides in pertinent part as follows:

> (b) For the purpose of this Act—
>
> (1) "Agency" means any office or any place of business of a foreign bank located in any State of the United States at which credit balances are maintained incidental to or arising out of the exercise of banking powers, checks are paid, or money is lent, but at which deposits may not be accepted from citizens or residents of the United States;
>
> . . .
>
> (5) "Federal agency" means an agency of a foreign bank established and operating under section 4 of this Act.

Id. As the Comptroller notes, "branch" is defined in section 1 of the Act, more permissively than is the term "agency," as simply "an office or any place of business of a foreign bank . . . at which deposits are received." Given the definitional framework for the Act established in section 1, the Comptroller argues, the only prohibition that should be attributed to section 4(d) is acceptance of deposits from United States citizens or residents by federal agencies.

The legislative history of section 4(d) only confuses the dispute. The "Rees Bill," which was a 1975 forerunner of the 1978 Act, was said by its author to allow acceptance of foreign deposits by federal agencies. *See* Press Release, Office of Congressman Thomas M. Rees, May 29, 1975 at 2, *quoted in* Memorandum In Support Of Defendant's Mo-

tion For Summary Judgment at 26. The definition of the term "agency" in the Rees Bill was, as defendant observes, carried forward to the final Act substantially unchanged. Defendant also notes Mr. St. Germain's speech during the House debates on July 29, 1976, in which he noted that the Act would "allow foreign banks to establish agencies in more than one state since agencies cannot accept domestic deposits." 123 Cong. Rec. 24403 (July 29, 1976). That is, however, nearly all of defendant's argument based upon the legislative history. And, on the other hand, plaintiffs can point to submissions to a Senate committee in 1976 tending to assume that section 4(d) should not permit acceptance of deposits of any kind by federal agencies. *See International Banking Act of 1976: Hearings on H.R. 13876 Before the Subcomm. on Financial Institutions of the Senate Comm. on Banking, Housing, and Urban Affairs*, 94th Cong., 2d Sess. 354-55 (1976) (comments of the Institute of Foreign Bankers). The rest of the evidence of Congressional intent offered by both parties on this point is even less instructive.

Given the ambiguity of the statute and the confused and scant legislative history, the Comptroller's view of section 4(d) seems not unreasonable. Section 4(b), it should be noted, flatly granted federal agencies and branches of foreign banks "the same rights and privileges as a national bank" in the home State, with some exceptions. It is clear that the Act's sponsors did not intend to permit acceptance of domestic deposits by federal agencies as well as by federal branches. It may well be that the only function of the controverted language of section 4(d) was thus to withdraw whatever authority the Comptoller might appear to have gained under section 4(b) to authorize acceptance of domestic deposits at federal agencies. Such a view is supported by the first words of section 4(d), which establish that section 4(d) has effect "[n]otwithstanding any other provision of this section [*i.e.*, section 4]." If plaintiffs were correct in their view, then careful drafting section 4(d) would have extended the "notwithstand-

ing" preface in section 4(d) not just to section 4 itself but to the whole Act, to avoid the confusion created if the definition in section 1(b)(1) were read with section 4(d). The Court therefore concludes that the Comptroller properly read sections 1(b)(1) and 4(d) together when he promulgated regulations that permit federal agencies to accept foreign-source deposits. 12 C.F.R. § 28.2(b) (1981). It is fundamental that "a section of a statute should not be read in isolation" from the rest of the Act. *Richards v. United States*, 369 U.S. 1, 11 (1962); *cf. Philbrook v. Glodgett*, 421 U.S. 707, 713-14 (1975). Particularly is this so when, as here, the statute is susceptible to varying interpretations. *NLRB v. Lion Oil Co.*, 352 U.S. 282, 288 (1957).

Moreover, absent "compelling indications" that the Comptroller's interpretation is wrong, the Court is obliged not to overturn it. *Red Lion Broadcasting v. FCC*, 395 U.S. 367, 381 (1969); *Haviland v. Butz*, 177 U.S. App. D.C. 22, 27, 543 F.2d 169, 174 (1976). The deference owed an interpretation by the official charged with the statute's administration is heightened, of course, when the case involves his construction of a new statute in the drafting of which he participated. *Cf. Power Reactor Development Co. v. International Union of Electricians*, 367 U.S. 396 408 (1961). The interpretation of section 5 at stake here "was neither an afterthought of counsel nor a practice so informal as to raise doubts whether it was reflectively deliberated." *Natural Resources Defense Council v. Train*, 166 U.S. App. D.C. 312, 326, 510 F.2d 692, 706 (1975). The Comptroller has not shifted his position since the time when he issued his proposed rule. And the Court cannot say, based upon the terms of sections 1(b)(1), 1(b)(5) and 4(d), and the legislative history, that the statute specifically precludes the Comptroller's interpretation or that there is no basis in the legislative history for what he has done. *Cf. Ernst & Ernst v. Hochfelder*, 425 U.S 185, 214 (1976). Such a finding would be necessary to grant relief against the Comptroller's action. *See, e.g., Udall v. Tallman*, 380 U.S. 1, 16 (1965); *Unemployment Compen-*

sation Com'n v. Aragan, 329 U.S 143, 153-54 (1946). His interpretation of the ambiguous foreign-source deposits provision of the Act therefore will be affirmed.

An appropriate order accompanies this memorandum.

Louis F. Oberdorfer
UNITED STATES DISTRICT JUDGE

Date: September 30, 1981

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

CONFERENCE OF STATE BANK SUPERVISORS, *et al.*,
Plaintiffs,

v.

JOHN G. HEIMANN, COMPTROLLER OF THE CURRENCY,
Defendant.

Civil Action No. 80-3284

ORDER

For the reasons stated in the accompanying memorandum, it is this 30th day of September, 1981 hereby

ORDERED: That defendant's motion for summary judgment is granted; and it is

FURTHER ORDERED: That plaintiffs' motion for summary judgment is denied.

Louis F. Oberdorfer
UNITED STATES DISTRICT JUDGE

APPENDIX C

A SURVEY OF STATE REGULATION OF FOREIGN BANKS

1. **States Whose Statutes Prohibit Foreign Banks from Establishing Branches or Agencies**

Arizona (Ariz. Rev. Stat. Ann. §§ 6-201, 6-204, 6-391).

Arkansas (Ark. Stat. Ann. § 67-701).

Colorado (Colo. Rev. Stat. §§ 11-1-102(2), 11-3-101, 11-11-101).

Delaware (Del. Code Ann. Title 8, §§ 371(a), 379).

Idaho (Idaho Code § 26-202).

Iowa (Iowa Code Ann. §§ 524.107, 524.1603).

Kansas (Kan. Stat. Ann. §§ 9-701(a), 9-702, 9-703, 9-801, 9-2011).

Maine (Me. Rev. Stat. Ann. § 9-B-131).

Michigan (Mich. Stat. Ann. § 23.710(51)).

Minnesota (Minn. Stat. § 303.04).

Missouri (Mo. Rev. Stat. § 362.420).

Nebraska (Neb. Rev. Stat. § 8-114).

Nevada (Nev. Rev. Stat. § 659.115).

New Hampshire (N.H. Rev. Stat. Ann. § 384:24).

New Jersey (N.J. Stat. Ann. §§ 17:9A-316, 17:9A-331).

New Mexico (N. Mex. Stat. Ann. §§ 38-1-18, 58-1-76).

North Carolina (N.C. Gen. Stat. §§ 53-2, 53-127).

North Dakota (N.D. Cent. Code § 6-02-01).

Oklahoma (Okla. Stat. §§ 6-102, 6-305, 6-1401).

Rhode Island (R.I. Gen. Laws § 19-5-10).

South Dakota (S.D. Comp. Laws Ann. § 51-18-2).

States Whose Statutes Prohibit Foreign Banks from Establishing Branches or Agencies (cont.)

Tennessee (Tenn. Code Ann. § 45-2-1701).

Texas (Tex. Rev. Civ Stat. Art. 342-902 (Vernon)).

Vermont (Vt. Stat. Ann. Title 8, § 558).

Virginia (Va. Code § 6.1-5).

Wyoming (Wyo. Stat. §§ 13-1-101, 13-1-201, 13-10-108).

2. **States Which Prohibit Branches and Agencies of Foreign Banks by Construction of State Law**

Connecticut (*see* Conn. Gen. Stat. § 36-5a).

Indiana (*see* Ind. Code Ann. §§ 28-1-22-1 and 28-1-22-28 (Burns)).

Kentucky (*see* Ky. Rev. Stat. §§ 287.030, 287.670).

Ohio (*see* Ohio Rev. Code Ann. §§ 1101.04 and 1101.05 (Page)).

Utah (*see* Utah Code Ann. §§ 7-1-704; 7-3-2-).

West Virginia (*see* W. Va. Code § 31A-2-11).

Wisconsin (*see* Wis. Stat. Ann. §§ 221.01, 221.49).

3. **States Which Permit Foreign Banks To Establish Agencies Only**

Alabama (*see* Ala. Code § 5-1A-4 and Comment to § 5-3A-5).

Florida (Fla. Stat. ch. 663 and Fla. Admin. Code, Rule 3C-15.08)—a foreign bank may establish one agency and may also open a second agency office.

Georgia (Ga. Code Ann. §§ 41A-3301 - 41A-3311)—a foreign bank may establish a single agency only (§ 41A-3307).

Hawaii (Hawaii Rev. Stat. § 403-16).

Louisiana (La. Rev. Stat. Ann. § 6:80).

States Which Permit Foreign Banks To Establish Agencies Only (cont.)

Maryland (Md. Fin. Inst. Code Ann. §§ 12-201 - 12-211).

Mississippi (Miss. Code Ann. § 81-5-40).

Montana (Mont. Rev. Code Ann. § 32-1-103).

None of the above states permits foreign bank agencies to accept deposits.

4. **States Which Permit Foreign Banks To Establish Branches Only**

Illinois (Ill. Stat. (S.H.A.) ch. 17)—a foreign bank may open a single branch only, which must be located in the "central business district of Chicago" as defined in ch, 17, ¶ 2706.

Massachusetts (Mass. Gen. Laws Ann. ch. 167, § 37).

Oregon (Ore. Rev. Stat. §§ 713.010 - 713.110).

5. **States Which Permit Foreign Banks to Establish Either Branches of Agencies**

Alaska (Alaska Stat. § 06.05.367).

California (Cal. Fin. Code §§ 1756, 1756.1, 1756.2 (Deering)) (§ 1755 authorizes "depository agencies" to accept deposits from foreign nations and domiciliaries of foreign nations).

New York (N.Y. Banking Law § 202-a (McKinney)) (General Banking Board Regulation Part 81 permits agencies to accept only deposits from corporations, partnerships, trusts or associations in the amount of $100,000 or more).

Pennsylvania (Pa. Stat. Ann. Title 7, § 105(b.1) (Purdon))—a foreign bank may open only a single branch or agency. (Some agencies may accept Edge Act-type deposits of $100,000 or more upon agreement with the Federal Reserve Board).

States Which Permit Foreign Banks to Establish Either Branches or Agencies (cont.)

South Carolina (S.C. Code § 34-3-100).

Washington (Wash. Rev. Code §§ 30.42.010 - 30.42.900)—a foreign bank may open only a single branch or agency (§ 30.42.040).

Except as otherwise noted, none of the above states permits foreign bank agencies to accept deposits.

6. **States Which Impose Reciprocity Requirements With Respect to Foreign Bank Entry**

California—Cal. Fin. Code § 1756(c) provides:

> A foreign corporation organized under the laws of a foreign country may transact in this state the business of accepting deposits if under the laws of such foreign country a bank or trust company (organized under the laws of the United States or a state thereof) may be authorized to maintain either a branch or agency or may be authorized to own all the shares (except for directors' qualifying shares) of a banking organization organized under the laws of such foreign country and if it has complied with all of the requirements of Sections 1751 and 1756.1. In this subdivision "foreign country" includes, but is not limited to, any territory of the United States, Puerto Rico, Guam, and the Virgin Islands.

Florida—Fla. Stat. § 663-04 provides:

> (1) No international banking corporation shall transact a banking business, or maintain in this state any office for carrying on such business, or any part thereof, unless such corporation shall have . . .
>
> (e) Received a license duly issued to it by the department.

States Which Impose Reciprocity Requirements With Respect to Foreign Bank Entry (cont.)

(2) The department shall not issue a license to an international banking corporation unless it is chartered in a country which permits any bank having its principal place of business in this state to establish similar facilities therein or exercise similar powers.

Georgia—Ga. Code Ann. § 41A-3304 provides:

(a) No international banking corporation shall transact a banking business, or maintain in this State any office for carrying on such business, or any part thereof, unless such corporation shall have . . .

(5) received a license duly issued to it by the department.

(b) The department shall not issue a license to an international banking corporation unless it is chartered in a Country which permits banks chartered in the United States of America or any of its States to establish similar facilities therein.

Illinois—Ill. Stat. (S.H.A.) ch. 17. ¶ 2710 provides:

3. A foreign banking corporation upon receipt of a certificate of authority from the Commissioner, may establish and maintain a single banking office in the central business district of Chicago and may conduct a general banking business. No such foreign banking corporation is, however, entitled to a certificate of authority under this Act unless, under the laws of the country under which such foreign banking corporation was organized, a State bank and a national bank may be authorized to maintain a banking office which may engage in a general banking business or may be authorized to own all the shares (except for directors' qualifying shares) of a banking organization organized under the laws of such country.

States Which Impose Reciprocity Requirements With Respect to Foreign Bank Entry (cont.)

Upon receipt of a certificate of authority under this Act, a foreign banking corporation may conduct its banking business in this State with the same, but no greater, rights and privileges as a State bank, and except as otherwise provided in this Act, subject to the same duties, restrictions, penalties and liabilities now or hereafter imposed under the Illinois Banking Act upon a State bank. Any such banking office shall be maintained subject to supervision and examination by the Commissioner and such reports and examinations as are required of State banks under the Illinois Banking Act applicable to such banking office.

New York—New York Banking Law § 202-a provides:

2. A foreign banking corporation under the laws of a foreign country or of Puerto Rico may be licensed pursuant to article two of this chapter to maintain a branch or branches in this state and may engage in the business of receiving deposits in this state, if under the laws of such foreign country or of Puerto Rico, a bank or trust company may be authorized to maintain either a branch or agency or may be authorized to own all the shares (except for directors' qualifying shares) of a banking organization organized under the laws of such foreign country or Puerto Rico. A foreign banking corporation so organized and so licensed to maintain a branch or branches in this state may be authorized to exercise in this state the fiduciary powers specified in section two hundred one-b of this chapter, if under the laws of such foreign country or of Puerto Rico, a trust company may be authorized to exercise similar fiduciary powers through a branch or agency or may be authorized to own all the shares (except for directors' qualifying shares) of a banking organization or similar organization organized

States Which Impose Reciprocity Requirements With Respect to Foreign Bank Entry (cont.)

> under the laws of such foreign country or of Puerto Rico and authorized to exercise similar fiduciary powers. The banking board shall have power to prescribe, by specific or general regulation, the extent to which, and the conditions, in addition to those prescribed in this article, upon which, the fiduciary powers specified in section two hundred one-b of this chapter may be exercised, and deposits in the branches in this state of banking corporations organized under the laws of foreign countries or Puerto Rico, and credit balances in this state of banking corporations organized under the laws of any other state or country (including Puerto Rico), may be established, maintained and paid out.

Pennsylvania—Pa. Stat. Ann. Title 7, § 105(b.1) provides:

> Offices of foreign organizations—An organization engaged in the banking business under the laws of a foreign nation where it is domiciled may be authorized to engage in the business of receiving money for deposit or transmission and to establish an office for that purpose in this Commonwealth by written permission of the department, subject to the provisions of this subsection.
>
> In determining whether to grant such permission, the department shall consider the extent of reciprocity for banks from the United States to own interests in or operate banking businesses in the foreign nation which is the domicile of such organization and may deny such permission in the absence of substantial reciprocity.

Washington—Wash. Rev. Code § 30.42.090 provides:

> The supervisor shall not grant an application for an office of an alien bank unless the law of the

States Which Impose Reciprocity Requirements With Respect to Foreign Bank Entry (cont.)

foreign country under which laws the alien bank is organized permits a bank with its principal place of business in this state to establish in that foreign country a branch, agency or similar operation.

7. **Examples of States Which Place Limitations on the Operations of Branches or Agencies of Foreign Banks**

Illinois—a foreign bank branch may not exercise fiduciary powers (Op. Ill. Atty. Gen. S-1487, 1980).

Mississippi—under Miss. Code Ann. § 81-5-40, a foreign bank agency may engage in only such transactions as are related to international or foreign business or commerce.

Oregon—under Ore. Rev. Stat. § 713.012, a foreign bank branch may not exercise fiduciary powers unless it was lawfully established and engaged in the trust business prior to January 1, 1965.

Washington—under Wash. Rev. Code § 30.42.110, a foreign bank branch (a) must accept at least 80% of its deposits from persons who are non-resident foreign nationals, foreign governments, out-of-state corporations not qualified to do business in Washington, other banks, or other persons engaged in foreign commerce, (b) may make loans only to such persons (except that loans may not be made to other banks or foreign governments), and (c) may not exercise fiduciary powers. Under Wash. Rev. Code § 30.42.180, a foreign bank agency may make loans only for the purpose of financing international commercial activities.

As noted above, Florida permits foreign banks to open not more than one agency, with a secondary agency office; Georgia permits only a single agency; Illinois allows only a single branch; and Pennsylvania and Washington allow only a single branch or agency.

APPENDIX D

APPENDIX OF PERTINENT STATUTES AND REGULATIONS

I. Statutes

Section 1(b)(1) of the International Banking Act of 1978 (the "Act"), 12 U.S.C. § 3101(1) provides:

> "Agency" means any office or any place of business of a foreign bank located in any State of the United States at which credit balances are maintained incidental to or arising out of the exercise of banking powers, checks are paid, or money is lent but at which deposits may not be accepted from citizens or residents of the United States;

Section 1(b)(5) of the Act, 12 U.S.C. § 3101(5), provides:

> "Federal agency" means an agency of a foreign bank established and operating under [section 4 of this Act];

Section 4(a) of the Act, 12 U.S.C. § 3102(a), provides:

> Except as provided in [Section 5], a foreign bank which engages directly in a banking business outside the United States may, with the approval of the Comptroller, establish one or more Federal branches or agencies in any State in which (1) it is not operating a branch or agency pursuant to State law and (2) the establishment of a branch or agency, as the case may be, by a foreign bank is not prohibited by State law.

Section 4(b) of the Act, 12 U.S.C. § 3102(b), provides:

> In establishing and operating a Federal branch or agency, a foreign bank shall be subject to such rules, regulations, and orders as the Comptroller considers

appropriate to carry out this section, which shall include provisions for service of process and maintenance of branch and agency accounts separate from those of the parent bank. Except as otherwise specifically provided in this [Act] or in rules, regulations, or orders adopted by the Comptroller under this section, operations of a foreign bank at a Federal branch or agency shall be conducted with the same rights and privileges as a national bank at the same location and shall be subject to all the same duties, restrictions, penalties, liabilities, conditions, and limitations that would apply under the National Bank Act to a national bank doing business at the same location, except that (1) the requirements of section 481 of this title shall be met with respect to a Federal branch or agency if it is examined at least once in each calendar year; (2) any limitation or restriction based on the capital stock and surplus of a national bank shall be deemed to refer, as applied to a Federal branch or agency, to the dollar equivalent of the capital stock and surplus of the foreign bank, and if the foreign bank has more than one Federal branch or agency the business transacted by all such branches or agencies shall be aggregated in determining compliance with the limitation; (3) a Federal branch or agency shall not be required to become a member bank, as that term is defined in section 221 of this title; and (4) a Federal agency shall not be required to become an insured bank as that term is defined in section 1813(h) of this title.

Section 4(d) of the Act, 12 U.S.C. § 3102(d), provides:

> Notwithstanding any other provision of this section, a foreign bank shall not receive deposits or exercise fiduciary powers at any Federal agency. A foreign bank may, however, maintain at a Federal agency for the account of others credit balances incidental to, or arising out of, the exercise of its lawful powers.

Section 4(h) of the Act, 12 U.S.C. § 3102(h), provides:

> A foreign bank with a Federal branch or agency operating in any State may (1) with prior approval of the Comptroller establish and operate additional branches or agencies in the State in which such branch or agency is located on the same terms and conditions and subject to the same limitations and restrictions as are applicable to the establishment of branches by a national bank if the principal office of such national bank were located at the same place as the initial branch or agency in such State of such foreign bank and (2) change the designation of its initial branch or agency to any other branch or agency subject to the same limitations and restrictions as are applicable to a change in the designation of the principal office of a national bank if such principal office were located at the same place as such initial branch or agency.

Section 5(a) of the Act, 12 U.S.C. § 3103(a), provides:

> Except as provided by subsection (b) of this section, (1) no foreign bank may directly or indirectly establish and operate a Federal branch outside of its home State unless (A) its operation is expressly permitted by the State in which it is to be operated, and (B) the foreign bank shall enter into an agreement or undertaking with the Board to receive only such deposits at the place of operation of such Federal branch as would be permissible for a corporation organized under section 25(a) of the Federal Reserve Act under rules and regulations administered by the Board; (2) no foreign bank may directly or indirectly establish or operate a State branch outside of its home State unless (A) it is approved by the bank regulatory authority of the State in which such branch is to be operated, and (B) the foreign bank shall enter into an agreement or undertaking with the Board to receive only such deposits at the place of operation of such State branch as would be per-

missible for a corporation organized under section 25(a) of the Federal Reserve Act under rules and regulations administered by the Board; (3) no foreign bank may directly or indirectly establish and operate a Federal agency outside of its home State unless its operation is expressly permitted by the State in which it is to be operated; (4) no foreign bank may directly or indirectly establish and operate a State agency or commercial lending company subsidiary outside of its home State, unless its establishment and operation is approved by the bank regulatory authority of the State in which it is to be operated; and (5) no foreign bank may directly or indirectly acquire any voting shares of, interest in, or substantially all of the assets of a bank located outside of its home State if such acquisition would be prohibited under section 1842(d) of this title if the foreign bank were a bank holding company the operations of whose banking subsidiaries were principally conducted in the foreign bank's home State. Notwithstanding any other provisions of Federal or State law, deposits received by any Federal or State branch subject to the limitations of an agreement or undertaking imposed under this subsection shall not be subject to any requirement of mandatory insurance by the Federal Deposit Insurance Corporation.

Section 5(b) of the Act, 12 U.S.C. § 3103(b), provides:

Unless its authority to do so is lawfully revoked otherwise than pursuant to this section, a foreign bank, notwithstanding any restriction or limitation imposed under subsection (a) of this section, may establish and operate, outside of its home State, any State branch, State agency, or bank or commercial lending company subsidiary which commenced lawful operation or for which an application to commence business had been lawfully filed with the appropriate State or Federal authority, as the case may be, on or before July 27, 1978.

Sections 36(c) and (f) of the McFadden Act, 12 U.S.C. §§ 36(c) and (f), provide:

> (c) A national banking association may, with the approval of the Comptroller of the Currency, establish and operate new branches: (1) Within the limits of the city, town or village in which said association is situated, if such establishment and operation are at the time expressly authorized to State banks by the law of the State in question; and (2) at any point within the State in which said association is situated, if such establishment and operation are at the time authorized to State banks by the statute law of the State in question by language specifically granting such authority affirmatively and not merely by implication or recognition, and subject to the restrictions as to location imposed by the law of the State on State banks. In any State in which State banks are permitted by statute law to maintain branches within county or greater limits, if no bank is located and doing business in the place where the proposed agency is to be located, any national banking association situated in such State may, with the approval of the Comptroller of the Currency, establish and operate, without regard to the capital requirements of this section, a seasonal agency in any resort community within the limits of the county in which the main office of such association is located, for the purpose of receiving and paying out deposits, issuing and cashing checks and drafts, and doing business incident thereto: *Provided*, That any permit issued under this sentence shall be revoked upon the opening of a State or national bank in such community. Except as provided in the immediately preceding sentence, no such association shall establish a branch outside of the city, town, or village in which it is situated unless it has a combined capital stock and surplus equal to the combined amount of capital stock and surplus, if any, required by the law of the State in which such association is situated for the establishment of such

branches by State banks, or, if the law of such State requires only a minimum capital stock for the establishment of such branches by State banks, unless such association has not less than an equal amount of capital stock.

(f) The term "branch" as used in this section shall be held to include any branch bank, branch office, branch agency, additional office, or any branch place of business located in any State or Territory of the United States or in the District of Columbia at which deposits are received, or checks paid, or money lent.

Section 3(d) of the Bank Holding Company Act (the "Douglas Amendment"), 12 U.S.C. § 1842(d), provides:

Notwithstanding any other provision of this section, no application shall be approved under this section which will permit any bank holding company or any subsidiary thereof to acquire, directly or indirectly, any voting shares of, interest in, or all or substantially all of the assets of any additional bank located outside of the State in which the operations of such bank holding company's banking subsidiaries were principally conducted on July 1, 1966, or the date on which such company became a bank holding company, whichever is later, unless the acquisition of such shares or assets of a State bank by an out-of-State bank holding company is specifically authorized by the statute laws of the State in which such bank is located, by language to that effect and not merely by implication. For the purposes of this section, the State in which the operations of a bank holding company's subsidiaries are principally conducted is that State in which total deposits of all banking subsidiaries are largest.

II. Regulations

12 C.F.R. § 28.2(b) provides:

> A "Federal agency" is an office or place of business, licensed by the Comptroller and operated by a foreign bank in any State of the United States, which can engage in the business of banking but cannot exercise fiduciary powers or accept deposits from citizens or residents of the United States. A Federal agency may, however, maintain credit balances.

12 C.F.R. § 28.2(c) provides:

> A "Federal branch" is an office or place of business, licensed by the Comptroller and operated by a foreign bank in any State of the United States, which can engage in the business of banking, including the exercise of fiduciary powers and the acceptance of deposits from citizens and residents of the United States.

12 C.F.R. § 28.2(d) provides:

> A "Limited Federal branch" is a Federal branch licensed by the Comptroller which, pursuant to an agreement between the parent foreign bank and the Federal Reserve Board, can receive only such deposits as would be permissible for an Edge Corporation organized under section 25(a) of the Federal Reserve Act (12 U.S.C. 611). Except for this restriction, a Limited Federal branch can exercise the full range of powers available to any Federal branch.

12 C.F.R. § 28.3 provides:

> (a) Corporate Applications. A foreign bank desiring to establish a Federal branch or agency, to convert any state branch or agency or commercial lending company to a Federal branch or agency, to relocate a Federal branch or agency or to change the designation of its initial Federal branch or agency to any other Federal branch or agency, shall apply to the Office of the Comptroller of the Currency, Bank

Organization and Structure Division, 490 L'Enfant Plaza, S.W., Washington, D.C. 20219 in accordance with 12 C.F.R. 5.

(b) Application to Exercise Fiduciary Powers. A foreign bank shall not exercise fiduciary powers at a Federal branch unless it obtains approval of the Comptroller of the Currency in accordance with 12 C.F.R. 5. An application to exercise fiduciary powers may be submitted by a foreign bank at the time of filing for a Federal branch license or at any subsequent date.

(c) Application to establish a Limited Federal branch. Before submitting to the Comptroller an application to establish a Limited Federal branch, a foreign bank shall enter into an agreement with the Federal Reserve Board to receive at such branch only those types of deposits that would be permissible for an Edge Corporation organized under section 25(a) of the Federal Reserve Act (12 U.S.C. 611).

12 C.F.R. § 28.4 provides:

Except as otherwise provided by the International Banking Act, other federal laws or regulations, or any rules or orders of the Comptroller, operations of a foreign bank at a Federal branch or agency shall be conducted with the same rights and privileges and shall be subject to the same duties, restrictions, penalties, liabilities, conditions, and limitations that would apply to a national bank at the same location.

Office - Supreme Court, U.S.
FILED
MAR 8 1984
ALEXANDER L. STEVAS

No. 83-954

In the Supreme Court of the United States

OCTOBER TERM, 1983

CONFERENCE OF STATE BANK SUPERVISORS, ET AL., PETITIONERS

v.

C. T. CONOVER, COMPTROLLER OF THE CURRENCY OF THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether the court of appeals correctly upheld the Comptroller of the Currency's regulation, adopted pursuant to the International Banking Act of 1978, authorizing the licensing of federal offices of foreign banks in any state which does not exclude the type of foreign bank office to be established.

2. Whether the court of appeals correctly upheld the Comptroller of the Currency's regulation, adopted pursuant to the International Banking Act of 1978, providing that state law is not controlling on the issue of the permissible activities of federally-licensed interstate offices of foreign banks.

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12 C.F.R. Pt. 28 (1981)	3

Miscellaneous:

44 Fed. Reg. 65381-65387 (1979)	3
S. Rep. 95-1073, 95th Cong., 2d Sess. (1978)	5, 8, 9

In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-954

CONFERENCE OF STATE BANK SUPERVISORS, ET AL., PETITIONERS

v.

C. T. CONOVER, COMPTROLLER OF THE CURRENCY OF THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-47a) is reported at 715 F.2d 604. The opinion of the district court (Pet. App. 48a-62a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on August 9, 1983. An extension of time to file a petition for a writ of certiorari was granted to December 7, 1983, and the petition was filed on that date. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. The relevant facts are fully set forth in the opinions of the court of appeals (Pet. App. 1a-47a) and the district court (*id.* at 48a-62a). Briefly, prior to the enactment of the International Banking Act of 1978 (IBA), 12 U.S.C. 3101-3108, the establishment by foreign banks of offices in the United States was governed solely by state law. Federal law neither provided a national licensing option to such banks nor in any way restricted the scope of the operations such banks conducted pursuant to state law. As a result of this situation, foreign banks experienced certain advantages and disadvantages not shared by domestic banks. For example, foreign banks could open banking offices in as many states as would receive them, an interstate privilege denied domestic banking corporations. On the other hand, few states allowed offices of foreign banks to engage in the full range of banking activities allowed domestic banks. Indeed, the majority of states did not and still do not permit foreign banks to open domestic offices at all (Pet. App. 64a-65a).

The IBA's central goal was to accord foreign banks, as far as practicable, the same treatment accorded domestic banks on a uniform national basis. By way of illustration, for many years domestic banks could choose between state and federal chartering and regulation, whereas foreign banks could operate only under state law. The IBA, for the first time, made available a federal licensing option for foreign bank offices in the United States. IBA § 4, 12 U.S.C. 3102. Section 4 authorizes the Comptroller of the Currency (Comptroller) to license federal branches and agencies and further provides that, unless otherwise specified in the IBA, such offices are to have

the same powers as those of national banks. States retain the power to forbid all foreign bank branches and/or agencies, in which event such federally-licensed offices are not permitted. In addition, federally-licensed agencies are forbidden to receive deposits or exercise trust powers.

As noted above, prior to the IBA foreign banks enjoyed an interstate banking option denied domestic banks. The IBA addresses this situation in Section 5, 12 U.S.C. 3103. Foreign banks operating offices in more than one state must choose (or have designated for them) a "home state". Offices located outside that state ("interstate offices"), whether state-chartered or federally-licensed, may accept only the kinds of deposits an Edge Act corporation may receive (deposits directly related to international trade). Moreover, a federally-licensed interstate branch or agency may be approved by the Comptroller only if "its operation is expressly permitted" by the host state. State-chartered interstate offices, like state-chartered home-state offices, must, of course, be individually licensed by the host state.

2. On November 13, 1979, the Comptroller adopted final regulations and an accompanying interpretive statement (hereinafter collectively referred to as the Regulation) pursuant to the IBA. See 12 C.F.R. Pt. 28 (1981) and 44 Fed. Reg. 65381-65387 (1979). The Regulation was challenged in this action by the Conference of State Bank Supervisors and the Attorney General of the State of New York.[1] The complaint alleged that the Regulation was contrary to law in the following respects:

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[1] The States of Illinois and Washington later joined as plaintiffs. Only the Conference of State Bank Supervisors and the State of Illinois are petitioners in this Court.

A. The Regulation provides that the states' power to exclude *federally*-licensed foreign bank offices is limited to the power to forbid (or, as to interstate offices, simply not "expressly permit") the type of office proposed. Petitioners would further restrict the Comptroller's discretion to license federal offices by at least some of the criteria employed by the states in determining which banks may open state-chartered offices. The most significant of these criteria is reciprocity, *i.e.*, forbidding a specific foreign bank to open an office on the ground that the state's banks are not accorded similar privileges in the foreign bank's home country.

B. The Regulation provides that federal offices (whether home-state or interstate) have all the powers of national banks, with only such exceptions as are set out in the IBA (federal agencies may not receive deposits or exercise trust powers, and interstate federal branches may accept deposits only to the extent that an Edge Act corporation may do so). Petitioners contend that interstate federal offices may engage only in such activities as the host state permits for state-chartered offices of foreign banks.

C. The Regulation provides by negative implication that federally-licensed agencies may accept deposits from depositors who are neither citizens nor residents of the United States ("foreign source deposits"). Petitioners contend that the Comptroller incorrectly interpreted the IBA.

The district court granted summary judgment in favor of the Comptroller and upheld the Regulation. The court of appeals affirmed on the first two points, but reversed on the foreign source deposits issue. The Comptroller has complied with the court of appeals' determination as to foreign source deposits and does not seek review in this Court.

ARGUMENT

The decision of the court below is correct, represents a routine exercise in statutory construction, and does not conflict with the decisions of this Court or of any other court of appeals. Further review is therefore unwarranted.

1. The decision of the court of appeals is consistent with, indeed compelled by, the principle of uniform national treatment that underlies the IBA. See, *e.g.*, S. Rep. 95-1073, 95th Cong., 2d Sess. 2 (1978). IBA affords foreign banks the same option available to domestic banks: a choice between state or federal charter and regulation. Thus, what petitioners attempt to portray as a radical invasion of states' rights is no more than Congress's decision to approximate for foreign banks the same system that has governed our domestic dual banking system for more than a century. This is the manner in which the Comptroller construed the statute, and the court of appeals properly accorded substantial deference to the Comptroller's interpretation. *FEC* v. *Democratic Senatorial Campaign Committee*, 454 U.S. 27, 37 (1981); *Udall* v. *Tallman*, 380 U.S. 1, 16 (1965).

2. Petitioners' two principal arguments are based on factual and legal inaccuracies. First, they argue (Pet. 5) that the Regulation "improperly preempts state authority to make policy determinations concerning fiscal matters." This overblown argument ignores the fact that the decision below has no effect whatever on a state's authority to dispose of its public "fisc"; it also overlooks the significant and unchallenged powers retained by the states, pursuant to Sections 4(a) and 5(a) of the IBA, over the entry and operations of foreign banks. The most important of these are the powers:

a) to exclude offices of foreign banks entirely;

b) to exclude all branches of foreign banks, allowing only agencies (this power is all the more significant in light of the determination of the court below, unchallenged by the Comptroller, that regardless of what state agencies are permitted to do, federal agencies may not receive deposits of any kind);

c) to exclude all agencies of foreign banks, allowing only branches;

d) to exclude all offices of foreign banks except those that make the host state their home state.

In addition, of course, each state retains the plenary power to determine which particular foreign banks, if any, may be granted state-chartered offices, what types of offices will be permitted, how many of these offices there shall be and where they may be located, and what types of business may be transacted at those offices.[2]

In short, each state retains full power to determine what effect foreign bank presence, at federal as well as state offices, will have on the state's banking structure: it may exclude foreign bank offices entirely and, if it admits them, it may determine that they shall be of a deposit-taking variety (branches) or solely of a type that does not accept deposits (agencies). Even the number of offices allowed a foreign bank is contingent upon the state's choice of banking structure. The Comptroller may not allow a foreign bank to have additional offices in a state where, if it were a national bank, it could not have branches; this, in turn, is dependent upon the state's branching pol-

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[2] Of course, interstate offices may not engage in activities that contravene Section 5 of the IBA.

icy. See IBA § 4(h), 12 U.S.C. 3102(h); 12 U.S.C. 36.[3]

The only powers the Regulation denies to the states are: (1) the determination of *which* foreign banks may establish *federal* offices, once the state permits foreign banks to establish the *kind* of office involved (branch or agency); and (2) the restriction of powers of duly established federal offices, beyond requiring that they be operated solely as branches or as agencies.[4] Under the scheme the IBA envisions, states retain more power over the entry and operations of foreign banks than they have or ever had with regard to the establishment and operation of national banks. In light of this broad authority over foreign banks, there is a hollow ring to petitioners' complaint that the absence of still more power over federal offices deprives the states of authority over "fiscal matters" and intrudes upon a state's right to select its own banking structure.

3. Petitioners' second argument (Pet. 5) is that the decision below "frustrates one of the major congressional objectives in enacting the IBA—the removal of certain competitive advantages formerly enjoyed by foreign banks." Petitioners make clear (*id.* at 9-10) that the "competitive advantages" referred to are the advantages of interstate operations that are denied domestic banks. This argument is a gross distortion. While it is true that Congress intended IBA to end certain inequities in treatment, the past

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[3] The number and location of state-chartered branches are, of course, controlled by state law.

[4] States do not have these powers over domestically-chartered national banks, and the absence of such powers does not "preempt" state authority to control "fiscal matters".

inequity addressed by the IBA arose because two or more states could allow the same foreign banks to carry on full banking activities within their borders, providing such foreign banks with complete interstate banking privileges denied domestic banks by the McFadden Act, 12 U.S.C. 36, and, to an extent, by the Douglas Amendment, 12 U.S.C. 1842(d). Section 5(a) remedies this situation by preventing an interstate office of a foreign bank, *whether state chartered or federal*, from taking deposits that an Edge Act corporation may not accept. This severe limitation on interstate deposit-taking effected Congress's intent to achieve approximate equality between domestic and foreign banks. While only foreign banks may have interstate branches and agencies, Congress felt that its restriction on interstate deposit-taking evened the scales sufficiently since, as to other banking activities, domestic banks have alternatives (such as loan-production offices, correspondent relationships, and establishment of Edge Act corporations) that allow essentially equal competition.

The legislative history is consistent with our position. Thus, the Senate Report (S. Rep. 95-1073, *supra*, at 8) clearly focuses on interstate deposit-taking as the key unfair advantage to be dealt with:

> While it cannot be gainsaid that the avenues of interstate activity open to domestic banking organizations are significant and have greatly expanded their ability to compete across State lines, the essence of banking is the ability to receive deposits, and it is in this that foreign banks do enjoy a growing, significant interstate advantage over domestic banking organizations, which cannot receive domestic bank deposits outside of their home State.

Similarly, the Senate Report (at 11) leaves no doubt that express proscriptions in the IBA, not reliance on state control of federal offices, were chosen to remedy the perceived competitive inequality:

> section [5(a)] meets the competitive advantage problem by narrowly focusing on the key interstate advantage enjoyed by foreign banks—the ability to accept deposits at locations in several States.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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